(14,490.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 388.

GEORGE A. CUNNINGHAM AND JOHN P. BRANCH, APPELLANTS,

vs.

THE MACON AND BRUNSWICK RAILROAD COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

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1 UNITED STATES OF AMERICA, *Southern District of Georgia,* } ss:

At a stated term of the circuit court of the United States of America for the southern district of Georgia, held at the United States court-rooms in the city of Savannah, in and for the said district, on Thursday, the seventh day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Wm. B. Woods, U. S. circuit judge for said circuit, presiding, and the Hon. John Erskine, U. S. judge for Georgia.

GEORGE A. CUNNINGHAM, Complainant, and THE MACON AND BRUNSWICK RAILROAD COMPANY *et al.*, Defendants. } In Equity. Bill for Discovery, Relief, Etc.

Be it remembered that heretofore, to wit, on the 29th day of September, A. D. 1877, came the said complainant and filed his bill for discovery, relief, etc., against the said defendants in the words and figures following, to wit:

2 *Bill.*

UNITED STATES OF AMERICA, *Southern District of Georgia.* }

To the judges of the circuit court for said district:

George A. Cunningham, a citizen of and resident in the State of Virginia, brings this his bill of complaint in behalf of himself and all holders of the second series of the bonds of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia, who may choose to be made parties hereto and bear their *pro rata* of expenses against the said The Macon and Brunswick Railroad Company, of said district, a corporation created by the laws of Georgia and having its principal place of business in the city of Macon in said district, and against Edward A. Flewellen, W. A. Lofton, and George S. Jones, all citizens of and residing in the State of Georgia and in said district and styling themselves "Directors of the Macon and Brunswick railroad," and against J. W. Renfroe, treasurer of the State of Georgia, and Alfred H. Colquitt, governor of the State of Georgia, in the northern district thereof, and against the
3 First National Bank of Macon, a corporation created under the laws of the United States and located at and transacting its business in the city of Macon, in said southern district of Georgia, and against John H. James, a citizen of and resident in the northern district of Georgia.

And thereupon your orator complains and says:

That the General Assembly of Georgia, on the third day of December, 1866, passed an act authorizing the governor of Georgia to endorse the bonds of the Macon and Brunswick Railroad Company

to the extent of $10,000.00 per mile, and on the fourth of December, 1866, said assembly passed a series of resolutions annexing certain conditions to said endorsement, all of which will fully appear by reference to said act and resolutions.

Your orator further shows that, under said act and resolutions, said company issued bonds to the amount of $1,950,000, which were endorsed by the governor and afterwards negotiated by said company.

Your orator further shows that, by the provisions of said act, said endorsement operated as a statutory mortgage of said railroad and all other property of the company which they owned at
4 the time of the endorsement to the holders of said bonds for the better securing of the payment of said bonds.

Your orator further shows that out of abundant caution, or for some other reason unknown to your orator, said company, on the 22d day of June, 1870, executed a mortgage to the governor of Georgia for the purpose "of confirming the lien created by the aforesaid act in favor of the holders of said bonds, so endorsed as aforesaid," as will fully appear by reference to a copy of said mortgage hereto annexed marked A, to which the usual reference is prayed.

Your orator further shows that on the 27th of October, 1870, said General Assembly passed an amendment to said act of December 3d, 1866, authorizing the governor to endorse the bonds of said company for the amount of $3,000 per mile in addition to said endorsement of $10,000.00 per mile then made under the act of 1866.

Your orator further shows that before the passage of said last-named act and subsequent to the act of 1866, said company had issued a second class of bonds to the amount of $1,100,000 or other large sum, which were not endorsed by the State, and secured the same by what was called a second mortgage, subordinate in
5 rank to the lien created in favor of the $1,950,000 bonds endorsed by the State under the act of 1866.

Your orator further shows that the trustees under said second mortgage, by and with the consent of the holders of all of said second-mortgage bonds, executed a release or postponement of their lien in favor of the bonds of said company to the amount of $600,000, to be issued by the company and endorsed by the State under said act of 1866, as amended by that of October 27th, 1870, a copy of which release is hereto annexed marked Exhibit "B."

Your orator further shows that after said release had been executed and had been accepted by the governor and deposited by him in the executive office in Atlanta, said bonds so authorized to be endorsed by the act of 1870 were issued by said company to the amount of $600,000, and, after endorsement by the governor, negotiated by them for a valuable consideration in December, 1870.

Your orator hereto annexes a copy of one of the bonds (all of said bonds being alike except as to number and amount) issued and endorsed under the act of 1866, marked "C," and a copy of these (all being alike except as to number) issued and endorsed under the

act of 1866 as amended by the act of 1870, marked "D," and
6 prays reference to both as often as necessary.

Your orator further shows that during the session of the General Assembly of Georgia in 1872 that body appointed a committee to investigate the validity of the State's endorsement upon the bonds of the Macon and Brunswick Railroad Company (among other bonds issued and endorsed by the State), and after such investigation passed, on August 14, 1872, the following resolution:

"A resolution in reference to the State's guaranty on the bonds of the Macon & Brunswick Railroad Company.

"Resolved, by the senate and house of representatives in General Assembly met and it is hereby resolved by the authority of the same, that the State's guaranty placed on bonds of the Macon and Brunswick Railroad Company is binding on the State." Approved Aug. 14th, 1872.

Your orator further shows that the constitution provides: "The General Assembly shall pass no law making the State a stockholder of any corporate company, nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State prior to any other debt or lien except to laborers."

7 Your orator further shows that without any suspicion that the $600,000 series of bonds issued by said railroad company, and endorsed by the State under the act of 1866, as amended by the act of 1870, were in any way invalid, and relying on the statutory mortgage created by said acts on the property of said company in favor of said bonds, as well as the confirmation thereof by said recorded mortgage, executed by said company on June 22, 1870, and accepted by the governor, and also upon said postponement of lien by the second mortgages in favor of said $600,000 series, and upon the affirmance of the validity of said endorsement by the resolutions of August 14, 1872, as well as by the constitutional provision herein recited, your orator, after the approval of said resolutions of 1872, became, for a valuable consideration and in good faith, without any knowledge or notice whatsoever of any fraud or illegality in the issue, endorsement, or of any failure of said company to comply with the terms upon which said endorsement was authorized by law, the holder of nineteen of said second series of endorsed bonds, each for the sum of $1,000, numbered 120, 122, 123, 124, 125, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 518, 519, 520.

8 Your orator further shews that on July 1st, 1873, and on November 1st, 1873, said company failed to pay the coupons as well upon the $1,950,000 series as upon the $600,000, and has continuously failed to pay the coupons due at that date, and those due at all subsequent dates, whereby the principal of said bonds became due six months after the first default, according to the tenor and effect of said bonds.

Your orator further shews that he is still the owner of said bonds.

Your orator further shews that on or about July 2d, 1873, the

then governor of Georgia, under power vested in him by said acts of 1866, to seize said railroad in case of default of payment of the interest due on said bonds, seized said railroad and all other property of said company, including in said seizure the property mentioned in a trust deed from said company to one L. N. Whittle (hereto annexed, marked "E," to which the usual reference is prayed), which property is not covered by said statutory and executed mortgages, so far as the $1,950,000 series of endorsed bonds are concerned, having been acquired by said company after the last of said series had been endorsed, and with funds other than
9 the proceeds of said bonds, but is covered by said mortgages so far as the $600,000 series is concerned, having been bought prior to the endorsement of these latter.

Your orator shows that on March 6th, 1875, the General Assembly of Georgia passed a series of resolutions declaring the endorsement of the State upon the $600,000 series of bonds issued by said company "unconstitutional, null, and void," and reaffirmed the validity of the endorsement on the $1,950,000 series, and authorizing the governor to sell the Macon and Brunswick railroad with all its franchises, equipments, and appurtenances, etc., upon such terms and for such price in money or first-mortgage endorsed bonds (meaning the $1,950,000 series) of the Macon and Brunswick railroad, or bonds of the State, as in his judgment may be consistent with the interest of the State.

Your orator further shews that said governor, after seizing said road appointed said Flewellen receiver to take charge of the Macon & Brunswick railroad and all the property of said company and sell the same.

Your orator further shews that under orders from James M. Smith, the then governor of Georgia, said Flewellen, against
10 his own better judgment, advertised said railroad and its franchises and all other property of said company, so seized as aforesaid, including the property embraced in the deed to Whittle, for sale on the first Tuesday in June, 1875, in the city of Macon, at the depot of the Macon and Brunswick Railroad Company, at public outcry, and between the legal hours of sale. Said advertisement also stated that said property would be offered "for cash" for the bonds of the State or the first-mortgage bonds of the company endorsed in behalf of the State, under the authority of the act approved December 3d, 1866.

Your orator further shews that the said governor, in his order directing sale dated Atlanta, April 5, 1875, also states the terms of sale in the same language, notwithstanding which said governor on the day of sale caused it to be announced that said first-mortgage bonds would only be received at their then market value, which was much below par, thus causing said railroad to sell far below its true value, and deterring the holders of said bonds from bidding on said railroad, who, had they been permitted to pay for said property with bonds endorsed by the State and held by them, would have paid a much higher price than the said property brought.

11 Your orator further shows that said governor in making said sale did not do so "in such manner and at such times as in his judgment would best subserve the interest of all concerned."

On the contrary, said sale was effected in such a manner and at such time as even in the judgment of said governor was most detrimental to the interests of the bondholders, and this was done in the face of the warning given to said governor by said Flewellen; that the time and manner of sale selected was most unfortunate, and so admitted to be in a letter from said governor to said Flewellen, bearing date March 24th, 1875, a copy of which is hereto annexed marked "F," to which reference is asked.

Your orator further shows that said sale took place as advertised and the entire property seized was sold and bought by said governor for the State, and a deed made by him to the State for the whole of it (a copy of which deed is hereto annexed marked "G," with prayer for reference thereto), the whole price paid for the vast amount of property being the nominal sum of $1,000,000.00.

Your orator insists that said sale is void for the following reasons:

12 1st. Because neither the legislature nor the governor had the right to exclude the $600,000 series of endorsed bonds from being used as so much cash in the purchase of said road at their face value. Certainly they were entitled to have so used in the event of the exhaustion of the $1,950,000.00, which themselves should have — received as cash at par.

2nd. Because the governor was not authorized to bid on said property for the State and the State had no constitutional power to make the purchase, or if said sale is not void it is certainly voidable, because under the statutory and executed mortgages the State is the trustee of the property mortgaged for the benefit of the bondholders and had no right to buy at her own sale as such trustee without incurring the risk of having such sale set aside at the instance of any beneficiary under the trust, and your orator as such beneficiary elects to set said sale aside.

Your orator further shows that the State of Georgia has voluntarily taken up all of said $1,950,000.00 series of bonds, for which she was liable on her endorsement by substituting therefor her own bonds, dollar for dollar, and that J. W. Renfroe, as

13 treasurer of Georgia, is regularly paying the coupons on the bonds so substituted as they fall due.

Your orator insists that said act of 1870 opened said statutory mortgage and said mortgage executed in pursuance of said act of 1866 for the benefit of the holders of the bonds issued under the act of 1866, as amended by said act of 1870, so as to give them a lien upon said railroad prior to all others except the $1,950,000 series, which the last-named series having been voluntarily paid by the State, the second series now constitute the first lien and are entitled to have said mortgages foreclosed for their payment.

Your orator further shews that the said Flewellen and others, so-called directors of the said Macon and Brunswick railroad, are op-

erating said railroad in entire disregard of the rights of your orator and other holders of the second series of State endorsed bonds and without appropriating any of the earnings of said railroad to the payment of said bonds or the coupons thereof, and that said bonds and coupons have remained wholly unpaid since the company first defaulted in payment of said coupons, more than six months before the filing of the bill in this case.

14 Your orator further shows that since the seizure of said railroad by the governor said Macon and Brunswick Railroad Company has remained entirely insolvent and has ceased to do business and owns no property other than that seized by the governor.

Your orator further shows that said property transferred to L. N. Whittle and another was transferred to them as trustees to dispose of the same and with the proceeds redeem certain fare bills of said company, but that said trust was never carried out by them, said fare bills having been fully paid with the earnings of said railroad.

Your orator further shows that the three bonds for one thousand dollars each of the $1,950,000 series of endorsed bonds held by Whittle under said deed were delivered by him to said Renfroe, who now holds them, and that said Whittle has also transferred on the books of the Southern and Atlantic Telegraph Company, in the city of New York, the 440 shares of stock conveyed to him in trust by said deed, which stock is now standing in the name of said Renfroe on the books of said company, said Renfroe regularly drawing the dividends thereof, amounting to — dollars.

15 Your orator further shows that bonds of the $600,000 series to the amount of $76,340.20 were exchanged for the same amount of coupons of the $1,950,000 series, and that the $600,000 series, to this extent at least, stands precisely upon the same footing with the $1,950,000, which have been twice pronounced valid by the State, yet the said Renfroe and all others holding the property of said Macon and Brunswick Railroad Company utterly deny your orator's rights and the right — all other holders of the $600,000 series of bonds to subject said property to the payment of said bonds.

Your orator further shows that lots Nos. 1 and 7, in block 10, southwestern corner, in the city of Macon, which are embraced in said deed *to* trust to Whittle and *and* another, are now held and claimed by said First National Bank of Macon. All other property of said company seized by the governor, except as herein otherwise stated, is now in the hands of said Flewellen and others, styling themselves as "directors of the Macon and Brunswick railroad."

Your orator further shows that the said mortgage from the Macon and Brunswick Railroad Company to the governor, recorded as aforesaid, is now in the hands of said Colquitt as governor, as are

16 also the release of the second mortgages in favor of the $600,000 series of bonds and the deed from James M. Smith, as governor, to the State of Georgia, of the entire property of said railway company and the trust deed to Whittle and Collins.

Your orator further shews that said Flewellen, Lofton, and Jones are directly interested in said railroad and other property herein alleged to be in their hands, paying themselves large salaries out of the earnings for the management thereof.

Your orator further shows that this bill is filed for the purpose, among others, of foreclosing said mortgages in favor of the payment of the said second series of endorsed bonds upon the assumption that said mortgages are mortgages to the governor of Georgia, as trustee for the bondholders, to secure the payment of the bonds endorsed by the State, and not mortgages or indemnity to the State to save her harmless against the liability incurred by said endorsement.

If, however, the court should be of opinion that the mortgages are mortgages of indemnity to the State, and that the sale of — railroad and purchase by the State were valid, then your orator insists that both series of endorsed bonds stand upon an equal footing and are entitled to be paid *pro rata* out of the proceeds of
17 said sale, and that the sums paid by said Renfroe, as treasurer of the State, in taking up the coupons of the State bonds which have been exchanged for the $1,950,000 series of Macon & Brunswick railroad endorsed bonds represent a portion of these proceeds and should be paid *pro rata* upon both series of bonds, and that when the legislature of Georgia appropriates any sum for the payment of the principal of the State bonds so exchaged said sum should be in like manner divided *pro rata* among the holders of both series of endorsed bonds, and that the State bonds so exchanged should themselves be treated as the proceeds of the sale of the railroad and divided *pro rata* among all the holders of both series of State endorsed bonds.

Your orator further shows that among the holders of said State bonds so exchanged as aforesaid is John H. James, of the northern district of said State, any many others unknown to your orator, who, when discovered, your orator prays may be made parties defendant hereto, all of whom — said bonds in varying amounts unknown to your orator.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby
18 prayed, and may upon their several and respective corporal oath and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer—that is to say:

1. Whether it is not true that under the act of December 3d, 1866, the Macon and Brunswick Railroad Company did issue bonds to the amount of $1,950,000 which were endorsed by the State and afterwards put in circulation.

2. Whether said company did not under said act, as amended by the act of 1870, issue bonds to the amount of $600,000 which were endorsed by the State and afterwards put in circulation.

3. Whether said Flewellan did not take charge of said railroad and other property under the appointment of the governor after the latter's seizure of the same and advertise the same as stated in this bill.

4. Whether said Macon & Brunswick Railroad Company is not insolvent, and did it not cease to pay the coupons on said endorsed bonds more than six months before the filing of this bill in this cause, and has it not continuously since failed to pay said coupons? Has said company any property other than that seized by the governor?

Did not the Macon and Brunswick Railroad Company execute the original of the copy mortgage hereto attached marked A, and did not the governor accept the same and have it recorded, and is not the original now in the executive office in Atlanta?

Did not the governor sell said railroad as stated and buy it in for the State for $1,000,000, and has not the State since said sale taken up the entire series of bonds herein called the $1,950,000 series and substituted her own bonds for the same, dollar for dollar, and does not the State treasurer pay the coupons of such substituted bonds as they fall due in January and July of each year?

7. Did not the governor announce in advance of said sale that he would only take in payment for said railroad cash, State bonds, or first-mortgage bonds of said railroad (meaning by the last named the $1,950,000 series), and that these last would only be received at their then market value, and was not such market value very much below par?

8. Do you not know that ma-y of the holders of the endorsed bonds would have bid a much higher price for the railroad than it brought had they been permitted to pay for it with said endorsed bonds at par?

9. Are not said Flewellen and others, calling themselves directors of the Macon and Brunswick railroad, operating said road in entire disregard of any interest which the holders of the second series of endorsed bonds may have in the road and without appropriating any of the earnings of the road to the payment of said bonds or the coupons?

10. Did not said railroad company make default in the payment of the coupons of said second series of endorsed bonds more than six months before the filing of this bill, and has it not continuously since failed to pay said company?

11. It it not true that in seizing said railroad the governor seized other property belonging to said company not embraced in said mortgages so far as the same operated as a security for the payment of the first series of said endorsed bonds? Did he not seize all the property owned by the company at the time of the seizure? It not, specify what property he omitted to seize.

12. Was any of the property so seized which was not covered by the mortgages bought with the proceeds of the $1,950,000 series of endorsed bonds? If so, specify the property so bought. Was any of it bought with the proceeds of the $600,000 series? If so, specify it.

13. Was not the property named in the trust deed to L. N. Whittle and others annexed to his bill as Exhibit E acquired by the company after the last endorsement was placed on the $1,950,000 series, and was not such property bought by the company with funds derived from other sources than the proceeds of said last-named series?

14. Were not the fare bills issued by said company redeemed with the earnings of the railroad and not with the proceeds of the property conveyed to Whittle and others in trust for that purpose? If not, how were they redeemed and to what amount?

15. Was not all the property seized by the governor sold with the railroad and bought in by him in the name of the State for $1,000,000? If not, name the property not included in the sale.

16. Were not the bonds styled in the schedule annexed to said trust deed to Whittle and others "supplementary bonds endorsed by the State" exchanged for those of the first-mortgage bonds of $1,000 each, and were not said bonds delivered by Whittle to said Renfroe, and did not Whittle transfer on the books of the Southern and Atlantic Telegraph Company the four hundred and
22 forty shares of stock named in the deed to him to said Renfroe, and are not said bonds and stocks now held by Renfroe? Does not Renfroe deny that complainant and other holders of the $600,000 series of endorsed bonds have any interest in the property transferred by Whittle to him, and does he not regularly draw dividends upon the stock? How much has he so drawn?

17. Is not all other property seized as aforesaid (with the exception stated) now in the hands of said Flewellen and others, styling themselves directors of the Macon and Brunswick railroad, and do they not deny all interest of the holders of the second series of endorsed bonds therein?

18. Does not the First National Bank of Macon hold and claim lots 1 and 7, in 10th block, in the city of Macon, as stated?

19. Is not said Renfroe in possession of said first-mortgage bonds Nos. 291, 292, and 293, each for $1,000, as herein stated, and were not the 400 shares of stock in the Southern and Atlantic Telegraph Company transferred to him by Whittle as stated, and do they not now stand in said Renfroe's name on the books of said company?

20. Is it not true that before the act of October 27th, 1870,
23 and subsequent to that of 1866 said railroad issued what were called second-mortgage bonds to the amount of $1,100,000 or other large sum, secured by a mortgage on said railroad and appurtenances subordinate in rank to the lien in favor of the $1,950,000 bonds endorsed by the State under the act of 1886, and did not the trustees under that mortgage postpone their lien, as stated, in favor of said $600,000 series?

Was not this postponement accepted by the governor, and did he not after such acceptance endorse said $600,000 series? Is not Exhibit B a copy of the instrument postponing said lien, and is not the original now in the executive office?

21. Are not Exhibits C and D correct copies, the first of the first series of endorsed bonds and the second of the second series?

22. Did not the governor seize said property as stated, and was it not advertised for sale as stated, and did not the governor in his order directing said sale state the terms of the sale in the language used in said advertisement?

23. Was not the governor warned by Flewellen that the terms of sale and the time selected were not the best for an advan-
24 tageous sale, and is not Exhibit F a copy of his letter to said Flewellen in answer to such advice?

24. Is not Exhibit G a copy of the deed made by James M. Smith, as governor, to the State, and is not the original now in the executive office?

25. Were not the coupons of the first series of endorsed bonds to the amount of $76,340.20 exchanged for the same amount of bonds of the second series of endorsed bonds; if not, how much was so exchanged?

26. Are not all papers stated in this bill to be in the executive office or in the hands of said Colquitt, as governor, now in said office and subject to the control of said governor?

27. What salaries do said Flewellen, Lofton, and Jones receive as "directors of the Macon and Brunswick railroad," and how paid?

And that a receiver may be appointed to take charge of said railroad and other property of said company, and the various defendants herein named be decreed to deliver all of said property now in their hands to said receiver, and that said Renfroe may be decreed to transfer said four hundred and forty shares of stock to said receiver on the books of the Southern and *and* Atlantic Telegraph Company, as well as surrender the bonds now held by him
25 in lieu of those delivered to him by Whittle to said receiver, and that the said defendants may be enjoined from parting with said property or any of it or the proceeds thereof except as this court may decree, and that the said mortgages may be foreclosed and the property embraced therein sold and the proceeds applied to the payment of said $600,000 series of State endorsed bonds and their coupons past due and the remainder of such proceeds, if any, paid to whomsoever they may be who are entitled to it.

And that said Colquitt may bring into court the originals of all papers herein alleged to be in his possession or in the executive office, and that the deed from James M. Smith, as governor, to the State of Georgia may be cancelled.

Or, if the court should be of opinion that said mortgages are mortgages of indemnity to the State and said purchase of said railroad by the State is valid, then that any of said property not covered by the mortgages may be decreed to be delivered by the holders thereof to said receiver, and that said Renfroe be enjoined from paying any further coupons on the bonds of the State exchanged for the $1,950,000 series of said endorsed bonds, and that the holders
26 of said exchanged bonds, when discovered, may be made parties defendants hereto and compelled, with said John H. James, to deliver the amount of such bonds held by each, and that they may be compelled to account to your orator and other holders of said $600,000 series of bonds for their *pro rata* of such exchanged

bonds, and, in the meantime, that John H. James be restrained from disposing of said exchanged bonds.

And that your orator may, with other holders of said second series of bonds, have such other and further relief as the circumstances of the case may require and to your honors shall seem meet, may it please your honors to grant unto your orator, not only the writ of injunction, to be directed to the said Edward A. Flewellen, W. A. Loftin, and George S. Jones, styling themselves "directors of the Macon & Brunswick railroad;" the First National Bank of Macon, and J. W. Renfroe, restraining them from parting with the property hereinbefore described or so much thereof as may be in their hands or the proceeds thereof; or, if the court be of opinion that the sale of said railroad to the State was valid, then restraining them from parting with so much of said property not covered by the mortgages as may be in their hands, and
27 restraining said John H. James from parting with any of said exchanged bonds now held by him, and said Renfroe from paying any of the coupons of said State bonds so exchanged for the first series of endorsed bonds, until further order of this court; but also the usual writ of subpœna to be directed to the said defendants against whom injunction is prayed and the Macon and Brunswick Railroad Company and John H. James and said Colquitt, commanding them, under a penalty to be therein limited, by attorney and personally, or by attorney, to be and appear on a certain day before this honorable court to make answer to the matters and things herein set forth, and that your honors will grant an order appointing some fit and proper person, to be named by the court, to take charge of said railroad and other property of said Macon and Brunswick Railroad Company, and hold the same until the further order of the court, and that the State of Georgia may come in and make herself a party defendant to this bill if she should wish so to do, and that the court will pass a further order requiring said Colquitt to bring into court the originals of all
28 papers herein stated to be in his hands or in the executive office.

And your orator will ever pray, etc.

A. G. MAGRATH,
W. W. MONTGOMERY,
Complainant's Solicitors.

NOTE.—Each defendant is required to answer all the interrogatories.

W. W. MONTGOMERY,
Complainant's Solicitor.

STATE OF GEORGIA, }
Richmond County. }

I, Thomas P. Branch, attorney-in-fact of George A. Cunningham, do swear that the facts stated in the foregoing bill relating to the purchase of the bonds therein named and the non-payment of the

coupons to said bonds attached are true of my own knowledge. The other facts stated in said bill I believe to be true.

THOS. P. BRANCH.

Sworn to and subscribed before me this 17th day of September, 1887.

W. M. MOORE, [SEAL.]
U. S. Commissioner for So. Dist. Ga.

29 EXHIBIT A.

To all to whom these presents shall come, Greeting:

Know ye whereas, by an act of the General Assembly of the State of Georgia, passed on the 4th day of December, one thousand eight hundred and sixty-six, entitled "An act to extend the aid of the State to the completion of the Macon & Brunswick railroad and for other purposes," his excellency the governor of said State was authorized to place the endorsement of said State on certain bonds of the Macon & Brunswick Railroad Company to be by them issued on the terms and for the amount in said act specified, as by reference thereto will more fully and at large appear;

And whereas it was in said act further provided that any endorsement of said bonds when made as aforesaid should not only vest the title to all property of every kind which might be purchased therewith in the State of Georgia until all the bonds so endorsed should be paid, but that the said endorsement should be, and was hereby, understood and declared to operate as a first or prior lien or mortgage on all the property of the said Macon & Brunswick
30 Railroad Company to be enforced as specially provided in said act above referred to;

And whereas, in pursuance of said act, the endorsement of the State has been placed on certain of the bonds of said company amounting in the aggregate to the sum of one million nine hundred and fifty thousand dollars, fifteen hundred of said bonds being for the sum of one thousand dollars each and nine hundred of said bonds being for the sum of five hundred dollars;

And whereas the said The Macon & Brunswick Railroad Company are desirous of confirming the lien created by the aforesaid act in favor of holders of said bonds so endorsed as aforesaid:

Now, therefore, this indenture witnesseth that the said The Macon & Brunswick Railroad Company, parties of the first part, for the purpose of confirming the aforesaid lien and for the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations above referred to and endorsed as aforesaid, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by his excellency Rufus B.
31 Bullock, governor of the State of Georgia, party of the second part, and to his successors in office and assigns forever, — all their railroad constructed or to be constructed from Macon to Brunswick, including the branch road to Hawkinsville, in the State

of Georgia, with its superstructure, tracks, rails, bridges, viaducts, culverts, fences, and other appurtenances, together with all depots, engine-houses, car-houses, station-houses, and other structures, all machine shops and other shops, and the lots, pieces, or parcels of ground on which the same are or may be erected, and all the pieces of land which shall be used for depots or station purposes, with the appurtenances; also all locomotives, tenders, cars, and other rolling stock or equipments, and all machinery, tools, implements, fuel, and materials acquired or to be hereafter acquired for the constructing, operating, repairing, or replacing the said railroad or any part thereof or any of its equipments or appurtenances, and including also all franchises, rights, and privileges of said parties of the first part connected with or relating to the said railroad or the construction, maintenance, or use thereof; but nothing herein contained shall be construed as including any lands of the company
32 not necessary to be retained for the roadway, depot, grounds, stations, shops, engine-houses, car-houses, nor required, and
— singular the tenements, hereditaments, and appur-enances thereunto belonging or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same, and any and every granted and described premises, with the appurtenances; to have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his successors in office and assigns, to his and their own proper use, benefit, and behoof forever: Provided always, and these presents are upon this express condition, that if the said Macon and Brunswick Railroad Company, parties of the first part, of their successors or assigns, shall well and truly pay said principal sum of money mentioned in the condition of the said bonds or obligations and the interest thereon at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and estate hereby granted shall cease, determine, and be void, and if default shall
33 be made in the payment of said sum of money above mentioned or the interest that may grow due thereon or of any part thereof, that then and from thenceforth, upon information of such default, it shall be lawful for the said party of second part, his successors in office and assigns, to seize and take possession of all the hereinbefore-described property and apply the earnings of said road to the extinguishment of said bond or bonds or coupons for the interest due or to become due thereon and to sell the said road and its equipments and other property belonging to the said Macon & Brunswick Railroad Company in such manner and at such time as in his judgment may best subserve the interest of all concerned.

And as the attorney of the said parties hereto of the first part for that purpose by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchaser-thereof a good an- sufficient deed or deeds of conveyance in the law for the same in fee simple and out of the money arising from

such sale to retain the principal and interest which shall then be due on the said bonds or obligations, together with the costs and charges of advertisement and sale of the said premises, rendering the surplus of the purchase-money (if any they shall be) unto Macon and Brunswick Railroad Company, parties of the first part, their successors or assigns, which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises or any part thereof by, from, or under them or either of them.

34

In witness whereof the said parties of the first part have caused their common seal to be affixed and the same to be subscribed by their president the day and year first above written.

GEO. H. HAZLEHURST, *President.*
G. E. STOCKBRIDGE, *Secretary.*

Sealed and delivered in presence of—the words "and assigns" erased wherever they appear in this mortgage before the execution of the same, this 22d day of June, 1870—

C. J. WILSON.
L. N. WHITTLE,
Notary Public, Bibb Co., Ga. [L. S.]

Recorded July 22nd, 1870.

CLERK'S OFFICE, SUPERIOR COURT, *August 17th*, 1877.

GEORGIA, }
Bibb County. }

I certify that the annexed and foregoing five pages contain a full, true, and complete copy of an original mortgage deed from the Macon & Brunswick Railroad Company to the State of Georgia as the same appears from the records and files of said court.

35

A. B. ROSS, *Clerk.* [L. S.]

EXHIBIT B.

Know all men by these presents that whereas by indenture of mortgage, dated the first day of September, one thousand eight hundred and sixty-eight, the Macon & Brunswick Railroad Company did mortgage unto Samuel A. Strong and James J. Goodwin, of the city of New York, as trustees, all the road, road-bed, and property of them, the said Macon & Brunswick Railroad Company, described and set forth in said indenture, to secure the payment of certain bonds of said company therein mentioned, subject, however, to the lien and rights of the State of Georgia growing out of the endorsement by said State under and in accordance with the terms of an act of legislature of said State passed on the fourth day of December, one thousand eight hundred and sixty-five, entitled "An act to ex-

tend the aid of the State to the completion of the Macon and
36 Brunswick railroad and for other purposes," of certain bonds of said company to the extent of ten thousand dollars a mile, which said last-mentioned bonds had been so endorsed and issued prior to the execution of said mortgage; and whereas afterwards, namely, on the twenty-seventh day of October, one thousand eight hundred and seventy, another act was passed by said legislature of the State of Georgia amendatory of said first-mentioned act, and entitled "An act to amend an act to extend the aid of the State to the completion of the Macon & Brunswick railroad and for other purposes," under and by which said amendatory act the governor of said State was authorized to place the endorsement of the State to the extent of three thousand dollars per mile upon the bonds of said Macon and Brunswick Railroad Company in addition to ten thousand dollars, as recited in the said act so amended; and whereas the holders of the said bonds secured by the said mortgage to us as trustees, and issued by said Macon and Brunswick railroad have, in writing duly executed by them, consented that the said additional three thousand dollars a mile of bonds, the endorsement of which by the State of Georgia
37 has been authorized by said amendatory act passed October 27th, 1870, — be a prior lien upon the property embraced in the said mortgage in such manner and to such extent as is required under the constitution of Georgia and the act authorizing such endorsement, and have in writing duly executed by them as aforesaid authorized, empowered, and directed us, Samuel A. Strang and James Goodwin, as trustees as aforesaid, to execute such instrument as shall be necessary to carry out the purpose aforesaid and to comply with the terms of the said constitution and law in such manner as that said endorsement shall operate as a lien or mortgage on said property of said Macon & Brunswick Railroad Company prior to the lien of said mortgage to us as trustees above mentioned: Now, therefore, in consideration of the premises and of one dollar to each of us in hand, the receipt of which is hereby acknowledged, we, Samuel A. Strang and James J. Goodwin, trustees as aforesaid, do hereby subordinate and postpone the lien of said indenture of mortgage made by the Macon & Brunswick Railroad Company to us as trustees, dated the first day of September, one thousand eight hundred and sixty-eight, in such manner and to such extent that the endorsement of the State of Georgia upon the bonds of
38 the said Macon & Brunswick Railroad Company to the extent of three thousand dollars a mile, being *being* six hundred thousand dolla-s ($600,000) in all, authorized by the act of the legislature of the State of Georgia passed the 27th day of October, 1870, entitled "An act to amend an act to extend the aid of the State to the completion of the Macon & Brunswick railroad, and for other purposes," shall operate as a lien or mortgage on said property of said Macon and Brunswick Railroad Company prior to the lien of said mortgage executed and delivered to us as trustees, so as to comply with the terms of the constitution of the State of Georgia and the law of such State authorizing such endorsement; but the said mortgage so executed and delivered to us shall continue to be held

valid and in full force according to the terms and tenor thereof, subject only to the lien of the endorsement of the State of Georgia of the said bonds of the said Macon & Brunswick Railroad Company for ten thousand dollars a mile and for three thousand dollars a mile in addition thereto.

In witness whereof we have hereunto set our hands and seals this first day of November, one thousand eight hundred and seventy.

SAM'L A. STRANG. [L. S.]
39 JAMES J. GOODWIN. [L. S.]

Sealed and delivered in presence of—
E. K. GOODWIN.
EDWIN F. COREY.

STATE OF NEW YORK,)
City and County of New York,) ss:

Be it remembered that on this 19th day of December, A. D. 1870, before me, the undersigned, Edwin F. Corey, a commissioner. resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Georgia to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared Samuel A. Strang and James J. Goodwin, to me personally known to be the individuals named in and who executed the foregoing instrument, and severally acknowledged that they executed the same for the purpose therein named and mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY,
Commissioner.

40 EXECUTIVE DEPARTMENT,
ATLANTA, GA., *August 23rd*, 1877.

I, I. W. Avery, secretary of the executive department, do hereby certify that the above and foregoing is a true and correct copy of a paper executed by Sam'l A. Strang and James J. Goodwin, trustees of second-mortgage bonds of the Macon & Brunswick Railroad Company, dated September 1st, 1868, and marked "indenture of postponement and release," which said paper is now of file in this department.

In witness whereof I have hereunto set my hand and affixed the seal of the executive department this the day and year first above written.

[SEAL.]

I. W. AVERY,
Sec'y Executive Department.

41 EXHIBIT C.

State of Georgia.

UNITED STATES OF AMERICA.

($1,000.)

Macon & Brunswick Railroad Company. First and Only Mortgage Bond.

The Macon & Brunswick Railroad Company hereby acknowledge itself i-debted to his excellency Charles J. Jenkins, as governor of the State of Georgia, and to his successors in office, or to the bearer hereof, in the sum of one thousand dollars lawful money of the United States of America, to be paid twenty years after date, at the office of the company or its agency, with interest thereon at the rate of seven per centum per annum, payable semi-annually, on the presentation and surrender of the annexed coupons as they severally become due, and in case of non-payment, the governor of the State of Georgia is authorized to seize and take in possession the railroad belonging to said company, extending from the city of Macon to the city of Brunswick, Georgia, including the branch road to Hawkinsville, the main road and branch together being about one hundred and ninety-five miles, together with all the appurtenances and equipments of the same, and dispose of and
42 sell the same, and apply the proceeds to the payment of this and other bonds of said company having an equal and like lien as this bond, together with all interest that may be due and unpaid thereon, as he is authorized and directed to do by an act of the General Assembly of the State of Georgia, and of certain resolutions of said legislature explanatory thereof; said act and said resolutions approved by the governor on December 4th, A. D. 1866.

This bond is one of a series, amounting in the aggregate to one million nine hundred and fifty thousand dollars ($1,950,000), and consisting of fifteen hundred bonds, each for five hundred inclusively, also of nine hundred bonds, each for five hundred dollars, numbered from one to nine hundred, inclusively; and all of said 2,400 bonds, in the aggregate amounting to $1,950,000, have the same and equal lein and mortgage, secured as above recited; also, by a sinking fund of two per cent. per annum on the amount of said bonds, to be invested in bonds of the State of Georgia, and by endorsement of the State of Georgia on each and all of said bonds, as will more fully appear by reference to said act, and reso-
43 lution of the General Assembly of State of Georgia, assented to December 4th, 1866. It is agreed by said company with each successive holder of this bond that, in case of any default in the payment thereof, the said company will waive, and hereby waives, the benefit of any extension, stay, or appraisement laws now existing, or which may hereafter exist. This bond shall pass by delivery or by transfer on the books of the company, after a regis-

tration of ownership, certified hereon by the transfer agent of the company, shall be valid unless the last transfer be to bearer, which shall restore transferab-l-ty by delivery; but this bond shall continue subject to successive registration and transfer to bearer as aforesaid, at the option of each holder. This bond shall not become obligatory until it shall have been endorsed by the governor of the State of Georgia.

In witness whereof the said company have caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its secretary, at Macon, Georgia, on this the twenty-fifth day of February, in the year eighteen
44 hundred and sixty-seven.

[SEAL.] GEO. H. HAZELHURST, *President.*
ROBERT SCHMIDT, *Secretary.*

To the above bond are attached twenty-one coupons, numbered from twenty to forty, inclusively, one of which coupons is in the following words and figures, to wit:

No. 8.

The Macon & Brunswick Railroad Company, Georgia, will pay the bearer, at their office, or at their agency in the city of New York, thirty-five dollars on the first day of January, 1877, for interest on bond. (No. 20.)

$35.00.

R. SCHMIDT, *Sec'y.*

Endorsements.

EXECUTIVE DEPARTMENT,
MILLIDGEVILLE, GA., *January 1st, A. D.* 1867.

By virtue of authority of an act of the legislature of Georgia and of the resolutions of same, both assented to December 4th, A. D. 1866, and which have been accepted by the Macon & Brunswick Railroad Company, this bond is endorsed by the State of Georgia.

CHARLES J. JENKINS,
Governor of the State of Georgia.

Done by the governor:

N. C. BARNETT,
Secretary of State.

45 This bond is payable and transferable only on the books of this company, to the order of Ruth M. Brown, guardian of Nannie Brown, Ruth Brown, and Sarah N. Brown, minors, orphans of W. J. Brown, deceased.

Macon, March 20th, 1877.

F. EMMET,
Sec'y & Treas.

Endorsement: Macon & Brunswick Railroad Company, of the city of Macon, State of Georgia. First-mortgage bond, and also

secured by endorsement of the State of Georgia. (No. 8.) $1,000. Dated February 25th, 1867. Principal payable twenty years after date; interest, seven per cent., payable January 1st and July 1st, at the office of the company or agency in New York. This bond is transf-able by delivery or on the books of the company. Transferability may be restrained by resignation.

46 EXHIBIT D.

(Copy of bond.)

UNITED STATES OF AMERICA, }
State of Georgia. }

($1,000.) The Macon & Brunswick Railroad Co.

Know all men by these presents that the Macon & Brunswick Railroad Company is indebted to Morris K. Jesup, of the city of New York, or bearer, in the sum of one thousand dollars lawful money of the United States of America, which the said Macon & Brunswick Railroad Company promises to pay to the said Morris K. Jessup, or to the bearer thereof, on the 1st day of November one thousand nine hundred, at the agency of the company, in the city of New York, with interest thereon from the first day of November, 1870, at the rate of seven per centum per annum, payable semi-annually, free of Government tax, imposes or to be imposed, at the agency of the company, in the city of New York, on the 1st day of May and November in each year, on the presentation and surrender of the annexed coupons as they severally become due; and in the case of the non-payment of any half-yearly in-
47 stallment of interest which shall have become payable and shall have been demanded, if such default shall continue for six months after the maturity of the said installment, the principal of this bond shall forthwith become due and payable. It is agreed by the said Macon & Brunswick Railroad Company with each successive holder of this bond that in case of any default in the payment thereof the said company will waive, and hereby waives, the benefit of any extension, stay, or appraisement laws no- existing or transfer on the books of the company, in the city of New York, and at any other place which the company determines, after a registration of ownership, certified thereon by the transfer agent of the company. No transfer except upon the books of the *books of the* company shall be valid, unless the last transfer be to bearer, which restore- transferability by delivery; but this bond shall continue subject to successive registration and transfer to bearer as aforesaid at the option of each holder. This is one of a series to the extent of $3,000 per mile of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia in *in*
48 accordance with an act of the legislature passed October 29th, 1870.

In witness whereof the said Macon and Brunswick Railroad Company has caused its common seal to be affixed, and the same to

be attested by the signatures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its treasurer on the 1st day of November, in the year 1876.

[SEAL.] GEO. H. HAZELHURST, *President.*
A. EMMET, *Secretary.*

Coupons attached, of which eight, from November 1st, 1873, inclusive, are due and unpaid, payment thereof having been demanded and refused more than six months prior to the filing of this bill.

ATLANTA, GA., *November 1st*, 1870.

By virtue of authority of the act of the legislature of Georgia, passed 27th of October, 1870, this bond is endorsed by the State of Georgia.

Done by the governor.

RUFUS B. BULLOCK,
Governor of the State of Georgia.
DAVID G. COTTING, [SEAL.]
Secretary of State.

49 EXHIBIT E.

GEORGIA,)
Bibb County.)

Know all men by these presents that the Macon and Brunswick Railroad Company, under authority given its president and treasurer by a resolution of its board of directors, passed June 28th, 1873, does by these presents, for and in consideration of the sum of ten dollars to the said company, in hand paid, and for the purpose of securing the payment of the fare tickets or change bills issued by said company, sell, bargain, alien, and convey unto the governor of said State and his successors in office; or if his excellency J. M. Smith, the present governor, shall decline to act, then to Lewis N. Whittle and Stephen Collins, or survivor of them, all the property, rights of property of all and every kind, more particularly set forth and described in a schedule and description hereunto attached and made a part of this deed, together with all the rights, immunities, and appurtenances to the same, and to each and all of the same, in anywise appertaining or belonging, in full title or estate, but for the uses and purposes hereinafter set forth; that is to say, to take charge and possession of the same, and each and all of the
50 same, as trustee, for the purposes aforesaid, and to sell the same at such time and place, upon such terms and manner, at public or private sale, in the discretion of such trustee or trustees for the time being, and apply the proceeds to the redemption and payment of all the fare tickets or change bills which have been issued by said company.

Any sum or property that may remain undisposed of after paying of same and the expenses of this conveyance and said sales are to revert to and become the property of the said Macon & Brunswick Railroad Company, as if this deed had never been made.

In witness of all of which said Macon & Brunswick Railroad Company have caused this deed to be signed by its president and countersigned by its secretary and treasurer this June 30th, 1873, and the corporate seal of the company hereto attached.

GEO. H. HAZELHURST,
President M. & B. R. R.
F. EMMET, *Sec'y & Treas.* [L. S.]

Signed, sealed, and delivered in the presence of the undersigned this June 30th, 1873.

T. J. FUERRY.
CHRISTOPHER J. WILSON,
Notary Public, Bibb Co., Ga.

51 Schedule and description of property transferred to provide for redemption of fare bills of the Macon and Brunswick Railroad Company, viz:

Deed 1.

440 shares of the Southern and Atlantic Telegraph Company stock, certificate No. 1009, $11,000.

Deed 2.

B. B. Dykes to M. & B. R. R.

Eight lots of land known and designated as lots numbered 156, 157, 144, 145, 146, 127, 126, and 124, all in the 21st district of Pulaski county and said to contain, each lot, 202½ acres, equal to 1,620 acres in all, $3,000.

Deed 3.

R. C. King *et al.* to M. & B. R. R.

All that tract or parcel of land in the county of Glynn and State of Georgia—that is to say, the tract or parcel of marsh land butting and fronting on Turtle river from the south end of Dennis Trolley to the mouth of Plantation creek and extending from the water back between the said creek and the town-commons line of the city of Brunswick; which said land was granted by William Schley, governor of the State of Georgia, to John Piles by a grant or patent dated the seventeenth day of May, in the year 1837, by
52 the said Piles conveyed to Henry King on the 25th day of May, A. D. 1837, being the land on which the wharf of the said Macon and Brunswick Railroad Company has been placed, $3,500.

Deed 4.

City of Macon to L. N. Whittle, trustee M. & B. R. R.

Half of that lot or parcel of land situate, lying, and being in the county — Bibb and city of Macon and known and distinguished

on the plan of said city as lots numbers 3 and 4, in block thirty-seven (37), and as the guard-house property, and containing one acre, more or less, $8,000.

Deed 5.

M. Wright, adm'r, to M. & B. R. R.

All those certain lots or parcels of land situate, lying, and being in the city of Macon and State of Georgia, situated in square 55, known as lots 1 and 2, containing one acre of land, more or less; also part of lot No. 3, in said square, containing one-third of an acre, more or less, more particularly described in deed from one J. R. Bates to John Doyle; $2,500.

Deed 6.

City of Macon to M. and B. R. R.

All that parcel or portion of land situate in the city of
53 Macon, county of Bibb, State of Georgia, and known in the plan of said city as Camp Ogelthorpe, containing ten acre-, more or less, and bounded by the following lines: Beginning at a point on the southern corner of Pine and Seventh streets, running down the line of Pine street in a southeasterly direction — of 670 feet; thence at right angles to said line a distance of 525 feet to the line of Hawthorn street; thence along said line in a northwesterly direction a distance of 717 feet to the corner of Hawthorn and Seventh streets; thence along the line of Seventh street a distance of 775 feet to the aforesaid starting point; $5,000.

Deed 7.

J. C. Plant to M. & B. R. R.

All the following lots of lands situate, lying, and being in the city of Macon, county of Bibb, State of Georgia, known and distinguished in the plan of survey of the southwest common of said city as lots Nos. 1 and 7, in block 10, containing each one-half acre, more or less, $600.

Deed 8.

J. C. Plant to M. & B. R. R.

All that lot or parcel of land known in the plan of the city of Macon as lot No. 3, in square number 13, with all buildings thereon, which has been used — a mission church for some years past;
54 said lot contains one-half acre, more or less; $1,000.

Deed 9.

Sumner Lynn to M. & B. R. R.

All that tract or parcel of land situate, lying, and being in the county of Wayne, in the third district of the said county of Wayne,

being lot number 217, originally granted to Allen Tucker, containing 490 acres, more or less, bounded on the north by lot 218, on the east by lot 225, on the south by lot 216, and on the west by lot 170, $600.

Deed 10.

J. A. Anderson to M. & B. R. R.

All that tract or parcel of land situate, lying, and being in the 21st district of originally ——, now Pulaski county, Georgia, known and distinguished in the plan of said district as lot No. 155 and adjoining the lands now owned by the Macon & Brunswick Railroad Company on the north, or the west by the lands of E. E. Crocker and Daniel Train, on the south by the lands of Mrs. Martha Graham, and on the east by the land of the Macon & Brunswick Railroad Company and the Macon & Western Railroad Company, containing 202½ acres, $800.

Deed 11.

55 Amount due by Central Railroad & Banking Company, $28,800.

Deed 12.

Equipments bonds Nos. 290 to 300, both inclusive, for $500 each, now in the hands of M. K. Jesup & Co., of New York, $5,500.

Deed 13.

Supplementary bonds endorsed by the State, Nos. 546 to 548, both inclusive, for $1,000 each, now in the hands of M. K. Jesup & Co., New York, $3,000.

MACON, GA., *June 30th*, 1873.

The above — foregoing is the schedule and description of property and rights of property alluded to and embraced in deed of this date hereto attached to secure the redemption and payment of the fare tickets or change bills issued by the Macon & Brunswick Railroad Company, as provided by resolution of the board this June 30th, 1873.

GEO. H. HAZELHURST,
President M. & B. R. R. Co.
[L. S.] F. EMMET, *Sec'y & Treas.*

The amount has been received by the Macon & Brunswick Railroad Company and has been applied to cancelling the like amount of fare tickets. The eleven equipment bonds are now in the
56 hands of L. N. Whittle and Stephen Collins, trustees. The three supplementary bonds have been exchanged for three first-mortgage bonds, No. 291 to 293, both inclusive, now in the hands of L. N. Whittle and Stephen Collins, trustees.

GEORGIA, }
Bibb County. }

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in Book X, pages 45, 44, 43, and 42, October 11th, 1873. Filed same day.

A. B. ROSS, *Clerk.*

ATLANTA, GA., *July 2d*, 1873.

My official obligations to the public forbid that I should accept the trust declared in the within deed.

JAMES M. SMITH.

57 EXHIBIT "F."

STATE OF GEORGIA:

EXECUTIVE DEPARTMENT,
ATLANTA, GA., *March 24th*, 1875.

Dr. E. A. Flewellen, Macon, Ga.

MY DEAR SIR: I am just out of a pretty serious attack of illness and am at last able to creep down to the office. It started by a boil in the nose, which seemed to develope every ailment in my system. In fact, I am completely broken down by the complicated and harassing labors of the session and needed only the slightest send-off to have a bad spell of sickness; will get all right, I hope. I think I will advertise the Macon & Brunswick railroad property for sale the first Tuesday in June next. I fear, however, that the time will not be as favorable as a later day would be, but I am weary of the road and the whole villianous business, and, as the legislature has indicated the first of June for the sale, I am inclined to conform to their wishes. Have you seen Hardeman since the occasion you mentioned? I shall be in Macon soon. Indeed I must get
58 away from my office a little, as the close confinement is telling on my health. I hope to be able to go down the road to Brunswick when I visit you.

March 25th.—Compelled to break off to receive a few visitors having designs on the treasury; a very unusual circumstance. Have your letter this morning. About as I expected of Whittle; he must settle up. Please see to it he does so. I long for the time when I shall be free from Whittle, Hazlehurst & Co.

Yours truly, JAMES M. SMITH.

EXHIBIT "G."

Thursday, June 3d, 1875.

EXECUTIVE DEPARTMENT,
ATLANTA, GA., *June 3d*, 1875.

Know all men by these presents, that, whereas, by the first section of an act entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes," approved December 3d, 1866, the endorsement of the State was placed upon the bonds of said company to the extent of ten

thousand dollars per mile of the road of said company, making in the aggregate one million nine hundred and fifty thousand dollars.

And whereas, by second section of said act, it was provided that in the event any bond or bonds endorsed as aforesaid by the State, or the interest due thereon, should not be paid by said railroad company at maturity or when due, it should be the duty of the governor, upon information of such default by any balance of said bond or bonds, to seize and take possession of all the property of said railroad company and sell the said road and its equipments, and other property belonging to said company, in such manner and at such time as in his judgment might best subserve the interest of all concerned.

And whereas the governor, upon information received by him, did, on the second day of July, 1873, issue his proclamation, wherein, after reciting in effect that he had received information that Anna A. Green and other persons therein named were the holders of the bonds of said company, issued and endorsed as aforesaid, in the several amounts therein set forth, and that they had respectively presented the coupons for the semi-annual interest on said bonds due July 1st, 1873, to said company for payment, and that he had on that day, by virtue of the power conferred by said act, seized and taken possession of all the property of said railroad company, to the end that the same, together with all the earnings of the said railroad, might be held, applied, and disposed of as was required by the provisions of said act, and appointed George H. Hazelhurst, of the county of Bibb, the agent of the State, to receive, hold, possess, manage; and control all the property of said company for the purposes hereinbefore stated.

And whereas the said George H. Hazelhurst, in obedience to said proclamation, did take possession of all the property of said company hereinafter particularly mentioned and described, and as the agent of the State did turn over the same to Edward A. Flewellen, duly appointed to succeed him in said agency, who, by reason thereof, came into the possession, management, and control of the same, as agent aforesaid.

And whereas, by an executive order dated April 5th, 1875, the said Edward A. Flewellen was instructed and directed to sell all the property seized and held as aforesaid, to the highest bidder, at public outcry, at the depot of said railroad company, in the city of Macon between the hours of ten o'clock a. m. and two o'clock p. m. of the first Tuesday in June then next, such sale to be then made for cash, for bonds of this State, or the first-mortgage bonds of said company, endorsed under the act aforesaid.

And whereas, the said Edward A. Flewellen, after due and proper advertisement thereof, did expose for sale in the terms of said last-mentioned order the following named and described property of the said railroad company held by him as agent as aforesaid, viz; the Macon and Brunswick railroad, extending from the city of Macon

to Brunswick, Glynn county, Georgia, and the branch road extending from Cochran to Hawkinsville, a distance of ten miles; also about five miles of side track on the main line of said railroad, and about two miles of extension in the city of Brunswick, together with the franchises, equipments, and other property of said company, consisting of its road-bed, superstructure, right of way, motive power, rolling stock, depots, freight and section houses, machine shops, carpenter shops, grounds, furniture, machinery, tools and materials connected therewith; also tracts or parcels of land, numbered
62 one, three, and four, in district twenty, and numbers one hundred and twenty-four (124), one hundred and twenty-six (126), one hundred and twenty-seven (127), one hundred and forty-four (144), one hundred and forty-five (145), one hundred and forty-six (146), one hundred and fifty-one (151) one hundred and fifty-five (155) one hundred and fifty-six (156) one hundred and fifty-seven (157) in district twenty-one, in Pulaski county, in said State, and containing each two hundred and two and a half acres; also a certain tract or parcel of land in the city of Brunswick, known as the "wharf property" of the Macon and Brunswick Railroad Company; also one undivided half of lots numbers three and four, of block thirty-seven, in the city of Macon, known in the locality as the guard-house; also city lots numbers one and two, and a portion of number three, in square number fifty-five, in said city of Macon; also a tract or parcel of land, in said city of Macon, there known as "Camp Oglethorpe" containing ten acres, more or less; also city lots numbers one and seven, in block number ten, in South-
63 west Macon; also city lots numbers three and five in square number thirteen, in said city of Macon, with the buildings thereon; also tract or parcel of land number two hundred and seventeen, in district three, in Wayne county, Georgia, and four hundred and forty shares of stock in the Southern and Atlantic Telegraph Company, certificate number 1009.

And the whole of said property, having been offered as aforesaid, was then and there knocked off to the State of Georgia, at and for the bid and sum of one million dollars; the said State of Georgia having then and there become, through and by the governor thereof, the highest and best bidder for, and by virtue of the law in such cases made and provided the purchaser of, such property.

Wherefore, this indenture witnesseth that, I, James M. Smith, as governor of said State, for and in consideration of the premises, have this day granted, bargained, sold, aliened, and conveyed, and by these presents do grant, bargain, sell, alien, and convey, all and singular, the lands, rights, property, and effects hereinbefore mentioned and described to the said the State of Georgia, to have
64 and to hold the same, and each and every portion and parcel of the same, with every right and privilege thereunto in anywise belonging, in as full and ample manner as the same were owned, held, possessed, or enjoyed by the said Macon and Brunswick Railroad Company.

In witness whereof, I, James M. Smith, as governor aforesaid,

have hereunto set my hand and affixed the seal of the executive department the day and year first above written.

[SEAL.] JAMES M. SMITH, *Governor.*

Signed, sealed, and delivered in the presence of—
J. W. WARREN.
S. C. WILLIAMS,
Notary Public, Fulton County.

65 And afterwards, to wit, on the 29th day of September, A. D. eighteen hundred and seventy-seven, the following proceedings were had, to wit:

Subpœna in Equity for Southern District.

The President of the United States of America to the Macon and Brunswick railroad, Edward A. Flewellen, W. A. Lofton, and George S. Jones, directors of the Macon & Brunswick railroad; J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; the First National Bank of Macon, and John H. James, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and every one of you are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in November next, to answer to those things which shall then and there be objected to you in a bill for discovery, relief, &c., filed by the said complainant, and to do further and receive what the said court shall have considered in that behalf; and this you may in no-wise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, Georgia, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

Seal of the Court.

WILLARD F. WARNER,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso.*

WILLARD F. WARNER,
Deputy Clerk.

66 And afterwards, to wit, on the 10th day of October, A. D. 1877, came the marshal for the district of Georgia and made the following returns to foregoing process, to wit:

Return of Marshal.

I have served a copy of the within subpœna upon Geo. S. Jones, director M. & B. R. R., & J. C. Plant, president First Nat'l Bank of Macon, Ga., personally, at Macon, Ga., on the 4th day of October, 1877, and upon Geo. W. Adams, gen'l sup't M. & B. R. R., personally, & on W. A. Lofton, director M. & B. R. R., by leaving a copy at his usual place of residence, in the city of Macon, this 8th day of October, 1877.

The return of—

$24.32.

WM. H. SMYTH,
U. S. Marshal,
By A. E. SEIFERT, *Deputy.*

I have served a copy of the within subpœna in equity upon Edward A. Flewellen, one of the directors of the M. & B. R. R. Co., by leaving a copy at his usual place of residence, in Macon, Ga., this 9th day of October, 1877.

The return of—

WM. H. SMYTH,
U. S. Marshal,
By A. SEIFERT, *Deputy.*

67 And afterwards, to wit, on the said 29th day of September, A. D. 1877, the following proceedings were had, to wit:

Subpœna in Equity for Northern District.

The President of the United States of America to the Macon & Brunswick railroad, Edward A. Flewellen, W. A. Lofton, and George S. Jones, directors of the Macon and Brunswick railroad; J. W. Renfoe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; the First National Bank of Macon, and John H. James, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and every one of you are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in November next, to answer to those things which shall then and there be objected to you in a bill for discovery, relief, &c., filed by the said complainant, and to do further and receive what the said court shall have considered in that behalf; and this you may in nowise omit, under penalty of five hundred dollars; and have here this writ.

Seal of the Court. Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, Georgia, this twenty-eighth

day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

WILLARD F. WARNER,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable; otherwise this bill may be taken *pro confesso*.

WILLARD F. WARNER,
Deputy Clerk.

68 And afterwards, to wit, —, came the U. S. marshal for the district of Georgia and made the following returns to the foregoing process, to wit:

Return of Marshal.

I hereby certify that I have this fifth day of October, 1877, at Atlanta, Ga., in my district, served the within subpœna in equity upon the within-named Alfred H. Colquitt, governor of the State of Ga., & upon J. W. Renfroe, treasurer of said State, and upon John H. James by personally handing to each of them a copy thereof.

Atlanta, Ga., Oct. 5th, 1877.

$24.00. W. H. SMYTH,
U. S. Marshal.

And afterwards, to wit, on the 5th day of November, A. D. 1877, the following proceedings were had, to wit:

Appearance.

(The Macon & Brunswick railroad, Edward A. Flewellen, William A. Lofton, and George S. Jones, directors; J. W. Renfroe, treasurer, and A. H. Colquitt, governor, &c.)

69 STATE OF GEORGIA:

ATLANTA, GA., *Nov'r 30th*, 1877.

James McPherson, Esq., clerk U. S. circuit court, Savannah, Ga.

DEAR SIR: Please enter my appearance for the defendants on Monday next in case of George W. Cunningham, complainant, and The Macon and Brunswick Railroad, defendants. I represent all the defendants excepting The National B'k and J. H. James.

I shall object to the jurisdiction of the court and enter an appearance without waiving any right to make that objection at the proper time, and wish this letter presented as evidence thereof. Please enter my name as I sign it below for those of the defendants above stated.

Very truly y'rs, R. N. ELY.

On filing precept in this cause and on motion of Robert N. Ely, Esq., ordered that his appearance as solicitor for defendants The

Macon & Brunswick Railroad, Edward A. Flewellen, William A. Lofton, and George S. Jones, directors; J. W. Renfroe, treasurer, and A. H. Colquitt, governor, &c., herein be, and the same hereby
70 is, entered and that the cause be now docketed for said defendants.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of November, A. D. 1877.

[SEAL.] JAS. McPHERSON, *Clerk.*

And afterwards, to wit, on the fifth day of November, A. D. 1877, the following proceedings were had, to wit:

Appearance for J. C. Plant.

MACON, GA., *Nov'r 5th*, 1877.

To James McPherson, Esq., clerk U. S. dist. c't:

Put in appearance for J. C. Plant, in case of George S. Cunningham against The Macon and Brunswick Railroad and others.

WM. S. LOFTON.

On filing precept in this cause and on motion of Wm. A. Lofton, ordered that his appearance as solicitor for defendant J. C. Plant herein be, and the same hereby is, entered, and that the cause be now docketed, for said defendant.

71 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of November, A. D. 1877.

[SEAL.] JAS. McPHERSON, *Clerk.*

72 And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Demurrer and Plea of Def'ts Flewellen, Lofton, & Jones.

Edward A. Flewellen, William A. Lofton, and George S. Jones, three of the defendants to complainant's above bill of complaint, for cause why the inju-ction, the appointment of the receiver, and the relief prayed for should not — granted show and plead that these parties and the subject-matters set up in complainant's bill are not within the jurisdiction of nor can this honorable court take cognizance of them, because it appears in the bill itself and so is the fact that these defendants are but nominal parties, having no real interest in the matters set up in said bill, the real parties in interest in this proceeding being the complainant, on the one side, and the State of Georgia, on the other, and these defendants submit that the bill of complaint of the said complainant is but an attempt on the part of said complainant by indirect means to begin and
73 prosecute a suit against the State of Georgia.

These defendants have no interest in connection with or control over said Macon and Brunswick railroad other than as di-

rectors thereof, as the agents of & for the State of Georgia, for whom they hold & control it, its franchises and property of every description and its revenues as such agents under the laws of Georgia and by the authority thereof, and in no other right, claim, or interest whatever.

That upon the facts set out in said bill and its various allegations, charges, & averments the complainant is not in equity entitled to the relief prayed for therein against these defendants. These defendants further submit to this honorable court that there is no law or other authority in this State or elsewhere authorizing or requiring the State of Georgia, directly or indirectly, by herself or by her agents, to become or — made a party defendant to this proceeding without and against her consent, nor would these defendants as agents of the said State as aforesaid and acting for the said State aforesaid, as they in fact are, be justified or authorized under
74 the laws of this State in producing any deed or record in their control as said agents, and they have none other cause *or* make further answer in the premises so as to commit the State of Georgia or her interest and rights to this adjudication of this honorable court in this proceedings without her consent, which she has not but refused to give, and they protest most respectfully against being compelled so to do.

Wherefore these defendants ask the judgment of this honorable court that they may be hence dismissed with their re-sonable costs, and they will ever pray, &c.

R. N. ELY &
R. F. LYON,
Def'ts' Sols.

UNITED STATES OF AMERICA,
State of Georgia, County of Bibb.

Personally appeared Edward A. Flewellen, William A. Lofton, and Georges S. Jones, who, being duly sworn, say on oath that the facts set forth in the three foregoing pages are true in substance and in fact and *is* not interposed for the purpose of delay.

E. A. FLEWELLEN.
WM. A. LOFTON.
75 GEO. S. JONES.

Sworn to before me this 14th day of November, 1877.
[SEAL.] ROB'T A. NISBET,
U. S. Com'r, So. Dist. of Ga.

We certify that in our opinion the foregoing plea of defendants is well founded in point of law.
3 Dec'r, 1877.

R. F. LYON &
R. N. ELY,
Def'ts' S'l'rs.

And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Pleas of Defendant Renfroe.

One of the defendants to said bill, John W. Renfroe, for cause against the granting of said inju-ction and appointing a receiver, showeth: 1st, that he has no control over nor connection with said Macon & — railroad, and that whatever payments he has made or acts he has done or charged in said bill have been done by virtue of his office as treasurer of the State of Georgia, under the laws of
76 said State; 2nd, that any collections made by him out of assets formerly belonging to said Macon and Brunswick railroad were made by him as such treasurer and not otherwise, and have been deposited in the treasury of this State, and this defendant has no control over the same excepting such as is conferred by the laws of said State, and this defendant has no interest whatever in the matters touching said suit excepting as above stated.

ROBERT N. ELY,
R. F. LYON,
Defendants' Solic't's.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton.

Personally appeared John W. Renfroe, who, being duly sworn, says on oath that this his foregoing plea is true in point of fact and is not interposed for delay.

J. W. RENFROE, *Tr.*

Sworn to and subscribed before me this 1st day of December, 1877.

A. E. BUCK,
U. S. C. C. Com.

We certify that, in our opinions, the foregoing plea is well founded in point of law.

R. F. LYON &
R. N. ELY,
Def'ts' Sol'rs.

77 And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Demurrer of A. H. Colquitt.

The demurrer of Alfred H. Colquitt, one of the defendants, to the complainant's above bill of complaint.

The defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill of complaint contained to be true in such manner & form as the same *is* therein set forth and alleged, *and* doth demur to said bill, & for cause of demurrer says that the honorable court — not to take cognizance of the matters and things set up in said bill as against this defendant,

because it doth appear on the face thereon that this defendant has no personal interest in the same, but that the same is an attempt to make the State of Georgia, through this defendant, as the governor thereof —, and to make it a party to such proceeding, so as to bind it by the judgment and decision of this honorable —; and this defendant respectfully submits that this court cannot take jurisdiction of said matters and things as against this defendant for any such purpose.

78

Wherefore, for divers good cause of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgement of the court, whereby he demands the judgement of the court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

R. N. ELEY &
R. F. LYON,
Def'ts' Sol'rs.

We certify that, in our opinion, the foregoing plea is founded in point of law.

3rd Dec., 1877.

R. N. ELEY &
R. F. LYONS,
Def'ts' Sol'rs.

And afterwards, to wit, on the 4th day of December, A. D. 1877, the following proceedings were had, to wit:

Plea of Alfred H. Colquitt, One of the Defendants.

One of the defendants to said bill, Alfred H. Colquitt, for cause against the granting of said injunction and appointing a receiver, showeth:

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1st. That the subject of this bill is not within the jurisdiction of this honorable court, because it appears from the bill itself that this defendant is but a nominal party and has no interest, the real parties to the controversy being the said complainants on the one side and the State of Georgia on the other; and this defendant submits that the bill of complaint is but an attempt on the part of a citizen of Virginia by indirect means to begin and prosecute a suit against the State of Georgia. This defendant has no connection with or control over said Macon and Brunswick railroad other than that arising by virtue of his office as governor of the State of Georgia. The said railroad, including its franchises and property of every description, was seized and sold by the late executive of this State on account of the default of payment of interest on a series of bonds, amounting to one million nine hundred and fifty thousand dollars, which had been endorsed for said road by said State. The authority of this seizure and sale was conferred by the same act of the General Assembly of this State that authorized the said endorse-

80

ment. At this sale the said *the said* executive on behalf of and in the name of said State becomes, by vir. of a like provision of law, the purchaser of said road, including its franchises, and sole and exclusive owner thereof and in the full and complete possession thereof by the legally constituted agents of said State, to wit, Edward A. Flewellen, William A. Lofton, and George S. Jones, acting as the managers and directors of said road and controlling the same and all the property connected therewith.

2d. That the subject of this bill is not within the jurisdiction of a court of equity, because by the case made the complainant is not entitled to any equitable relief whatever as against this defendant.

3rd. This defendant further submits to this honorable court that there is no law of this State authorizing the State of Georgia to become a party defendant to this litigation, nor would this de-
81 fendant be justified under the laws of this State in producing any deeds or other records of file in the executive department to be used as evidence by the complainant.

ROBERT N. ELEY,
R. F. LYON,
Def'nd'ts' Sol'rs.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton.

Personally appeared Alfred H. Colquitt, who, being duly sworn, says on oath that this his foregoing plea is true in point of fact and is not interposed for the purpose of delay.

ALFRED H. COLQUITT.

Sworn to and subscribed before me this 3rd day of December, 1877.

A. E. BUCK,
U. S. C. C. Comm.

And afterwards, to wit, on the 4th day of March, A. D. 1878, the following proceedings were had, to wit:

Order Setting Case Down for Hearing.

Upon motion of complainant's counsel in the above-stated case, ordered that said case be set down for argument upon the plea
82 and demurrers filed by the defendants on the fifteenth day of April, 1878, or as soon thereafter as counsel can be heard.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, in said district, this 6th day of March, A. D. 1878.

[SEAL.] WILLARD F. WARNER,
Deputy Clerk.

And afterwards, to wit, on the 23rd day of March, A. D. 1878, came John H. James, defendant, by L. I. Glenn and Son, his solicitors, and filed his answer in words and figures following, to wit:

Answer of J. H. James.

The separate answer of John H. James to the bill of complaint filed against himself and others in the United States circuit court for the southern district of Georgia by George A. Cunningham.

Respondent, reserving the benefit of all legal exceptions to the many errors, uncertainties, and imperfections in complainant's bill contained, for answer thereto or to so much and such parts
83 thereof as he believes it is necessary for him to answer says:

Answer to first interrogatory. It is true that under the act of December 3rd, 1866, the Macon and Brunswick Railroad Company did issue bonds to the amount of $1,950,000, which were indorsed by the State and afterwards put in circulation.

Answer to 2nd interrogatory. And said company did, under said act as amended by the act of 1870, issue bonds to the amount of $600,000, which were endorsed by the State and afterwards *and afterwards* put in circulation.

Answer to 3rd interrogatory. The said Flewellen did take charge of said railroad, under the appointment of the governor, after the latter's seizure of the same, as stated in the bill.

Answer to 4th interrogatory. The Macon and Brunswick Company is insolvent and did cease to pay the coupons on said endorsed bonds more than six months before the filing of this bill, and it has since failed to pay said coupons. I do not know whether said company has any other property than that seized by the governor.

84 Answer to 5th interrogatory. I do not know whether the Macon and Brunswick Railroad Company executed the mortgage, a copy of which is attached to this bill, marked Exhibit A, nor do I know whether the governor accepted the same or have it recorded, nor do I know whether the original is now on file in the executive office.

Answer to 6th interrogatory. The governor did sell said railroad, as stated, and buy it in for the State for $1,000,000, and the State has since said sale taken up the entire series of bonds herein called the $1,950,000 series and substituted her own bonds for the same, giving her 6 per cent. bonds for seven per cent. bonds of the road, and the State treasurer now pays the coupons of such substituted bonds as they fall due in January and July of each year.

Answer to the 7th interrogatory. The governor did announce, in advance of said sale, that he would only take in payment for said railroad cash, State bonds, or first-mortgage bonds of said railroad, meaning by the last named the $1,950,000 series, and that these last would only be received at their true market value, which was eighty-eight (88) cents.

85 Answer to the 8th interrogatory. I do not know that many or any of the holders of the endorsed bonds would have bid a much higher price for the railroad than it brought had they been permitted to pay for it with said endorsed bonds at par.

Answer to the 9th interrogatory. The said Flewellen and others, calling themselves directors of the Macon and Brunswick railroad, are operating said railroad in entire disregard of any interest which the holders of the second series of endorsed bonds may have in the road and without appropriating any of the earnings of the road to the payment of said bonds or the coupons.

Answer to the 10th interrogatory. The Macon and Brunswick Railroad Company did make default in the payment of the coupons of said second series of endorsed bonds more than six months before the filing of this bill, and has since failed to pay said coupons.

Answer to the 11th interrogatory. I do not know that it is true that the governor in seizing said railroad seized other prop-
86 erty belonging to said company not embraced in said mortgages, so far as the same operated as a security for the payment of the first series of said endorsed bonds. I do not know whether the governor seized all the property owned by the company at the time of the seizure of the road.

Answer to the 12th interrogatory. I do not know whether any of the property so seized, which was not covered by the mortgages, was bought with the proceeds of the $1,950,000 series of endorsed bonds. I don't know whether any of it was bought with the proceeds of the $600,000 series.

Answer to the 13th interrogatory. I don't know that the property named in the trust deed to L. N. Whittle and others (annexed to this bill as Exhibit E) was acquired by the company after the last endorsement was placed upon the $1,950,000 series, nor do I know whether such property was bought by the company with funds derived from other sources than the proceeds of said last-named series.

Answer to the 14th interrogatory. The fare bills issued by said company were redeemed with the earnings of the road.

87 Answer to the 15th interrogatory. The property seized by the governor was sold with the railroad and bought in by him in the name of the State for $1,000,000.

Answer to the 16th interrogatory. I do not know whether the bonds styled in the schedule annexed to said trust deed to "Whittle and others, supplementary bonds endorsed by the State," were exchanged for three (3) of the first-mortgage bonds of $1,000.00 each, nor do I know whether said Whittle transferred on the books of the Southern & Atlantic Telegraph Company four hundred and forty shares of stock named in the deed to him to said Renfroe, nor do I know *know* that said Renfroe denies that complainant in this bill and others, holders of the $600,000 series of endorsed bonds, have any interest in the property transferred by Whittle to him, nor do I know that he draws dividends upon the stock.

Answer to the 17th interrogatory. I do not know that all the other property seized by the governor is now in the hands of said Flewellen and others, nor do I know whether or not they deny all interest of the holders of the second series of endorsed bonds therein.

88 Answer to the 18th interrogatory. I don't know that the

First National Bank of Macon hold and claim lots 1 & 7, 10th block, in the city of Macon.

Answer to the 19th interrogatory. I don't know whether — not the said Renfroe is in possession of said first-mortgage bonds Nos. 291, 292, & 293, each for $1,000; nor do I know whether the 444 shares of stock in the Southern — Atlantic Telegraph Company was transferred to said Renfroe by said Whittle, nor do I know in whose name they stand on the books of said company.

Answer to the 10th interrogatory. I know nothing about the said railroad company issuing what were called second-mortgage bonds to the amount of $1,000,000 or other sum, secured by a mortgage on said railroad & appurtenances, subordinate in rank to the lien in favor of the $1,950,000. I know nothing about any postponement of lien by the trustees or others. I don't know whether the postponement was accepted or not, as I know nothing about it. I do not know whether Exhibit B is a copy of the instrument
89 postponing said lien or not, or that *or* the original of the same is now on file in the executive office. I know nothing about it.

Answer to the 21st interrogatory. I do not know whether or not Exhibit- C & D are correct copies.

Answer to the 22nd interrogatory. The governor did seize said property as stated and it was advertised for sale as stated, and the governor in his order directing said sale did state the terms of sale in the language used in said advertisement.

Answer to the 23rd interrogatory. I know nothing about the governor being warned by Flewellen that the terms of sale and the time of sale selected were not the best for an advantageous sale; know nothing about the letter referred to.

Answer to the 24th interrogatory. I don't know whether Exhibit S is a copy of the deed made by James M. Smith as governor of the State of Georgia, nor do I know if the original is now on file in the executive office.

Answer to the 25th interrogatory. I do not know whether
90 coupons of the first series of endorsed bonds to the amount of $76,340.20 were exchanged for the same amount of bonds of the second series. I don't know how much, if any, were exchanged. I know nothing about it.

Answer to the 26th interrogatory. I do not know if all or any of the papers stated in this bill to be in the executive office or in the hands of said Colquitt, as governor, are now in said office or subject to the control of the governor.

Answer to the 27th interrogatory. I do not know what salaries the said Flewellen, Lofton, and Jones receive as directors of the Macon and Brunswick railroad, nor do I know how they are paid.

And respondent, for further answer, says that he did but does not now own any of the State bonds given in exchange for the $1,950,000 series of said endorsed State bonds.

And this defendant denies all and that there is any other matter, cause, or thing in the said complainant's said bill of complaint con-

tained material or necessary for this defendant to make answer unto & not herein and hereby well and sufficiently answered, con-
91 fessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

L. J. GLENN & SON,
Def'd'ts' Att'ys.

UNITED STATES OF AMERICA,
Northern District of Georgia.

In person before me came John H. James, who, being duly sworn, on oath says that the statements made in the foregoing answers are true to the best of his knowledge, information, and belief.

JOHN H. JAMES.

Sworn to and subscribed before me this March 21st, 1879.

A. E. BUCK,
U. S. C. C. Com'r.

92 And afterwards, to wit, on the 13th day of May, A. D. 1878, the following proceedings were had, to wit:

Order for Hearing on Demurrer in Vacation.

By consent of counsel ordered that the argument on the demurrer filed in the above-stated case be heard in vacation at Atlanta, at such time as may be agreed on by the judge who may hear the same & the counsel engaged in the cause.

In open court, May 13th, 1878.

JOHN ERSKINE, *Judge.*

And afterwards, to wit, on the 7th day of December, A. D. 1878, the following proceedings were had, to wit:

Decree on Demurrer.

This cause came on to be heard upon the separate demurrer of the defendant Alfred H. Colquitt and the joint demurrer of the defendants Edward S. Flewellen, William S. Lofton, and George S. Jones to the bill of complaint and was argued by counsel; on consideration whereof the court, being fully advised in the
93 premises, is of the opinion that the demurrers of said defendants are well founded in law; it is therefore ordered, adjudged, and decreed that said demurrers be, and the same are hereby, sustained, and, the said complainant not asking leave to amend the said bill, it is further ordered, adjudged, and decreed that said bill be dismissed as to the said defendants Alfred H. Col-

quitt, William S. Lofton, and George S. Jones at the cost of the complainant, which he is ordered to pay.

Dec. 7, 1878.

W. B. WOODS, *Judge.*

And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceedings were had, to wit:

Application for and Allowance of Appeal.

To the Honorable William B. Woods, judge of the United States circuit court for the southern district of Georgia, to which said cause was returned and who tried the same:

The petition of George A. Cunningham, the complainant in the above case, respectfully shows that he is desirous of entering an appeal to the Supreme Court of the United — from the de-
94 cision of your honor against him in said cause; that the amount in which he is interested and which he is deprived of by said decision is over five thousand dollars in value; that he does not desire a supersedeas and hereby tenders a bond for two thousand dollars as a security for costs in the cause, with Thomas P. Branch, C. H. Phinizy, and James G. Bailey as bondsmen, which he prays may be approved, or, if deemed insufficient, that your honor will indicate what will be sufficient security and give your petitioner time to comply with the requirement. The usual justification of the bondsmen and citation is also herewith presented with the request that your honor will sign the latter and grant the usual order allowing the appeal. Petitioner further shows that the decree from which he desires to appeal was rendered on the seventh day of December, 1878. And your petitioner will ever pray, &c.

W. W. MONTGOMERY,
Sol'r for Pet'r.

Order.

Upon the petition of George A. Cunningham, complainant
95 in the above-stated cause, praying the allowance of an appeal to the Supreme Court of the United States in said cause and tendering a bond for costs in the sum of two thousand dollars with Thomas P. Branch, C. H. Phinizy, and James G. Bailey as bondsmen, which bond is hereby approved; and, it appearing that *that* the amount of complainant's interest involved in said suit exceeds the sum of five thousand dollars, it is ordered that an appeal be allowed, and that the clerk of the United States circuit court for the southern district of Georgia send up to the October term, 1879, of the Supreme Court of the United States the record of said cause, certified as required by law.

July 16, A. D. 1879.

W. B. WOODS, *U. S. Judge.*

And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceedings were had, to wit:

Bond for Costs on Appeal.

Know all men by these presents that we, Thomas P. Branch
96 and Charles H. Phinizy and James G. Bailie, of the city of Augusta and State of Georgia, are held and firmly bound unto the Macon and Brunswick Railroad Company, a corporation created by the laws of the State of Georgia; Edward A. Flewellen, W. A. Lofton, & George S. Jones, these last styling themselves as "directors of the Macon & Brunswick railroad;" J. W. Renfroe, treasurer of Georgia; Alfred H. Colquitt, governor of the State of Georgia; the First National Bank of Macon, a corporation created under the laws of the United States and located at and transacting its business in the city of Macon, Georgia, and John H. James, all of the State of Georgia, in the sum of two thousand dollars to be paid to said obligees, their successors, administrators, executors, or assigns (as the case may require); to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated this fifteenth day of July, 1879.

Whereas George A. Cunningham, the complainant in the foregoing cause, hath taken an appeal to the Supreme Court of the
97 United States to reverse the decree rendered in the above-entitled action by the fifth circuit court of the United States for the southern district of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named George A. Cunningham shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

T. P. BRANCH. [L. S.]
C. H. PHINIZY. [L. S.]
JAMES G. BAILIE. [L. S]

Sealed and delivered in presence of—
HENRY W. CARR,
U. S. Commissioner, Southern Dist. of Georgia.

98 SOUTHERN DISTRICT OF GEORGIA, }
City of Augusta. }

Thomas P. Branch, Charles H. Phinizy, and James G. Bailie, obligors to the foregoing bond, depose and say under oath, each for himself, that he is a freeholder residing in said district, and that he is worth the sum of two thousand dollars over and above all his just debts and liabilities and the amount exempted from levy and sale by the laws of Georgia.

T. P. BRANCH.
C. H. PHINIZY.
JAMES G. BAILIE.

Sworn to and subscribed before me this fifteenth day of July, A. D. 1879.

HENRY W. CARR, [SEAL.]
U. S. Commissioner.

Bond approved July 16th, 1879.

W. B. WOODS,
U. S. Judge.

And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceedings were had, to wit:

99 *Petition for Appeal to Supreme Court, &c.*

To the honorable the Supreme Court of the United States:

The appeal of George A. Cunningham, the above-named complainant and appellant, respectfully showeth that upon the — day of ——, 1878, the above-named complainant filed his bill in the circuit court of the United States for the southern district of Georgia, against the above-named The Macon and Brunswick Railroad Company and against Edward A. Flewellen, W. A. Lofton, and George S. Jones, styling themselves "directors of the Macon and Brunswick railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James, defendants and appellees, praying for the foreclosure of a statutory mortgage on the Macon and Brunswick railroad in favor of said complainant, as a bondholder of said railroad company, and other bondholders of said railroad company and other bondholders and upon other property owned by said road, and alleging that complainant
100 and his cobondholders were second-mortgage bondholders; that their bonds had been endorsed by the State; that the company had failed to pay the accruing interest on the bonds, and that by the terms of the contract the principal had thereby become due; that by the terms of the statutory mortgage the State was made trustee for the bondholders with power to sell the property covered by the mortgage upon default in payment of the coupons on the bonds; that in alleged pursuance of such power the governor of Georgia hold sold said property and bid it in *it in* for the State of Georgia and applied the proceeds to the payment of the first-mortgage bonds, or rather had kept the road as the property of the State, paying the first-mortgage bonds (upon which the State was also endorser) out of the general funds of the State, and repudiating the claims of the second-mortgage bondholders; that complainant, for himself and such of his co-obligees as choose to join in the suit, elected to repudiate the sale made by their trustee at which the trustee had bought the property exposed to sale and prayed that the sale be decreed void; that part of the property so sold had passed into the hands of the First
101 National Bank of Macon; that the defendants, Flewellen, Loftin, & Jones, styling themselves "directors of the

Macon and Brunswick railroad," were now in possession of the road and operating it; that J. W. Renfroe was in possession of part of the property on which complainant & his co-obligees had a lien under said mortgage superior to all others; that said Colquitt was in possession of certain deeds made by the governor to the State, purporting to convey said railroad & other mortgaged property to the State of Georgia under said sale, and praying that said deed be cancelled, and that John H. James, with others unknown to complainant, was a holder of bonds of the State which had been exchanged for the first-mortgage bonds of the Macon & Brunswick railroad, and praying that if the statutory mortgage should be held to be a mortgage of indemnity to the State that then Renfroe be enjoined from paying the whole of the money appropriated by the State to the payment of said State bonds so exchanged as aforesaid, and that he be decreed to divide it *pro rata* among all the holders of the bonds of said company endorsed by the State; that com-
102 plainant owned more that $5,000 in value of said bonds; to which bill defendants demurred upon the ground that it was in effect a suit against the State of Georgia. The court sustained the demurrer and dismissed the bill on the seventh day of December, 1878.

Wherefore this appellant appeals from the whole of said decree of said circuit court, and respectfully prays that the decree of said circuit court and the bill, demurrer, and other proceedings in the cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and that the decree of the circuit court and every part thereof may be reversed and a decree made reinstating said cause and overruling said demurrer with costs or other such decree as to the Supreme Court shall seem just.

Dated July 26th, A. D. 1879.

W. W. MONTGOMERY,
Solicitor for Appellant.
A. G. MAGRATH, *Of Counsel.*

103 GEORGE A. CUNNINGHAM *vs.* THE MACON AND BRUNSWICK RAILROAD *et al.* } Bill for Discovery, Relief, &c.

SOUTHERN DISTRICT OF GEORGIA:

—— ——, being sworn, saith that on the 22d day of August, 1879, he served on each of the appelle-s in the above-stated case herein named, to wit, The Macon and Brunswick Railroad Company, Edward A. Flewellen, W. A. Lofton, George S. Jones, J. W. Renfroe, Alfred H. Colquitt, The First National Bank of Macon, and John H. James, a copy of the foregoing appeal, filed in this cause with the clerk of the circuit court in and for the southern district of Georgia, by leaving said copies in the clerk's office of the circuit court aforesaid for said appellees.

J. R. SAUSSEY.

Sworn to this 22d day of August, A. D. 1879, before me—
WM. M. HEYWARD,
Dep. Clerk U. S. C. C.

104 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Southern District of Georgia,* } ss:

I, Willard P. Ward, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, and that I have compared the same and they are true transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of George A. Cunningham, complainant, and The Macon and Brunswick Railroad Company *et al.*, defendants, lately pending in the circuit court and appealed by the complainant, the said George A. Cunningham, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at Savannah, in said district, this 3d day of October, A. D. 1879, and of the Independence of the United States the 104th.

[SEAL.] WILLARD P. WARD, *Clerk.*

105 *Citation.*

By the Honorable William B. Woods, one of the judges of the circuit court of the United States for the southern district of Georgia, to The Macon & Brunswick Railroad Company, a corporation created by the laws of Georgia; Edward A. Flewellen, W. A. Lofton, and George S. Jones, the last three styling themselves "directors of the Macon and Brunswick railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James:

Whereas George A. Cunningham has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Georgia, made in your favor, the said The Macon and Brunswick Railroad Company, Edward A. Flewellen, W. A. Lofton, and George S. Jones, "directors of the Macon and Brunswick Railroad Company;" J. W. Renfroe, treasurer of the State of Georgia; The First National Bank of Macon, and John H. James, and has filed the security required by law, you are therefore cited to appear
106 before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Atlanta, in the northern district of Georgia, in the fifth circuit, the 16th day of July, in the year of our Lord eighteen hundred and seventy-nine.

W. B. WOODS,
U. S. Judge.

Service.

Service of the foregoing citation acknowledged and further service waived.
This July —, 1879.

GEO. H. HAZLEHURST,
President of the Macon & Brunswick R. R. Co.

Copy of the within citation acknowledged and accepted as service and further service waived.
This 16th day July, A. D. 1879.

ROB'T N. ELY,
Att'y Gen'l of Georgia, Counsel for the Governor, the Treasurer, & the Directors M. & B. R. R., J. W. James.

107 I certify that on the 2nd day of August, 1879, at Macon, Ga., in my district, I personally served the within summons on the within-named First National Bank of Macon by showing to W. W. Wrigley, cashier, the same, with the seal of the court, then at same time delivering to him a copy thereof.
Macon, Ga., August 2d, 1879.
$14.30.

O. P. FITZSIMMONS,
U. S. Marshal.
By B. D. LUMSDEN,
Deputy U. S. Marshal.

Filed Aug. 25, 1879.

Assignment of Error.

Supreme Court of the United States.

GEORGE A. CUNNINGHAM
vs.
MACON & BRUNSWICK RAILROAD COMPANY *et al.*

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said George A. Cunningham, by A. G. McGrath and W. W. Montgomery, his solicitors, and says that in the record and pro-
108 ceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the decree aforesaid sustaining said demurrer and dismissing said bill as to the defendants Alfred H. Colquitt, Edward A. Flewellen, William A. Lofton, and George S. Jones is founded on the ground set up in the demurrer that the suit is in effect one against the State of Georgia, and that therefore the court has no jurisdiction of the case, whereas complainant insists that the suit is not against the State of Georgia, but against the defendants named in the bill in their individual character, and therefore the court has jurisdiction over both the parties and the subject-matter; and the said George A. Cunningham prays that the said decree dismissing the bill as to the de-

fendants named in the decree may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said decree.

A. G. McGRATH,
W. W. MONTGOMERY,
Compl't's Sol's.

Indorsement on cover: No. 80. George A. Cunningham, appellant, *vs.* The Macon & Brunswick R. R. Co. *et al.* S. Georgia C. C. U. S. Filed 16th October, 1879.

109 *Mandate Supreme Court United States.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Georgia:

Before you or some of you, in a cause between George A. Cunningham, complainant. and The Macon and Brunswick Railroad Company, Edward A. Flewellen, W. A. Loftin, and George S. Jones, styling themselves "directors of the Macon & Brunswick railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James, defendants, wherein the decree of the said circuit court entered in said cause on the 7th day of December, A. D. 1878, is in the following words, viz: "This cause came on to be heard upon the separate demurrer of the defendant Alfred H. Colquitt and the joint demurrer of the defendants
110 Edward A. Flewellen, William A. Lofton, and George S. Jones to the bill of complaint and was argued by counsel; on consideration whereof the court, being fully advised in the premises, is of opinion that the demurrers of said defendants are well founded in law.

It is therefore ordered, adjudged, and decreed that said demurrers be, and the same are hereby, sustained; and the said complainant not asking leave to amend the said bill, it is further ordered, adjudged, and decreed that said bill be dismissed as to the said defendants, Alfred H. Colquitt, William A. Lofton, and George S. Jones, at the costs of the complainant, which he is ordered to pay," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-three, the said
111 cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the

said defendants recover against the said complainant, George A. Cunningham, for their costs herein expended and have execution therefor.

3RD DECEMBER, 1883.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-first day of October, in the year of our Lord one thousand eight hundred eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Defendants.

Clerk.....
Attor'y.....
Paid by compl't.

Endorsement: No. 17. October term, 1883. Filed Dec. 16th, 1885. M. Erwin, dep. clerk.

112 *Decree upon Return of Mandate.*

In the Circuit Court of the United States for the Southern District of Georgia.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON AND BRUNSWICK RAILROAD COMPANY *et al.*, Defendants.
} In Equity.

Upon the return of the mandate granted by the Supreme Court of the United States in this cause affirming, with costs against the complainant, the decree of this court made on the 7th day of December, 1878, dismissing the bill as to the defendants Alfred H. Colquitt, William A. Lofton, and George S. Jones, it is ordered that the said mandate be filed and that the judgment and decree of the Supreme Court be, and the same is hereby, made the decree of this court.

December 16th, 1885.

EMORY SPEER,
U. S. Judge.

Endorsement: In the circuit court of the United States, southern district of Georgia. Geo. A. Cunningham *vs.* The Macon & Brunswick R. R. Co. *et al.* Decree upon the return of mandate. Filed Dec. 16th, 1885. M. Erwin, dep. clerk.

113 *Decree Pro Confesso.*

GEORGE A. CUNNINGHAM *vs.* THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*	May Rules, 1886. In Equity. Order Taking Bill *Pro Confesso.*

The mandate from the Supreme Court of the United States in the above-stated case having been made the decree of the United States circuit court for the southern district of Georgia, eastern division, on December 16, 1885, whereby the bill as to certain defendants other than the said The Macon & Brunswick Railroad Company was dismissed, and said The Macon & Brunswick Railroad Company having failed up to the time of this order to file its plea, demurrer, or answer to the bill in the clerk's office, and the time for doing the same not having been enlarged, it is ordered that the bill be taken *pro confesso* as against the defendant, The Macon & Brunswick Railroad Co., and that the cause do proceed *ex parte* as against said The Macon & Brunswick Railroad Company.

H. H. KING, *Clerk.*

W. W. MONTGOMERY.

Filed May 3, 1886.

H. H. KING, *Clerk.*

114 *Order Setting Down Bill for Decree.*

In the Circuit Court of the United States, Southern District of Georgia, Eastern Division.

GEO. A. CUNNINGHAM, Complainant, and THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Defendants.	In Equity.

Upon motion of complainant's solicitors it is ordered that the application of the complainant for a final decree *pro confesso* against the Macon & Brunswick Railroad Company do stand for hearing on Saturday, the 19th day of June, 1886.

EMORY SPEER, *Judge.*

Endorsements: In the circuit court of the United States, southern dist. of Ga., eastern division. George A. Cunningham, compl't, and The Macon & Brunswick R. R. Co. *et al.* Def'ts' order setting down bill for decree. Filed June 12, 1886. M. Erwin, dep. cl'k.

115 *Original Notice.*

In the Circuit Court of the United States, Southern District of Georgia, Eastern Division.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*, Defendants.

To Robert N. Ely, Esq., solicitor for defendants:

Take notice that at the May rules of said court an order was entered in said cause to takes the bill *pro confesso* as to the said defendant, The Macon & Brunswick Railroad Company, and that thirty (30) days having passed since the entering of said order we will apply to the court for a final decree against the said defendant on Saturday, the 12th day of June, 1886.

June 5th, 1886.

W. W. MONTGOMERY,
CHAS. N. WEST,
Compl't's Solicitors.

STATE OF GEORGIA,
Mitchell County.

Personally appeared Isaac A. Bush, who, being duly sworn,
116 deposeth and saith that on the ninth day of June, 1886, he gave to Robert N. Ely, in said county, a copy of the within notice personally.

ISAAC A. BUSH.

Sworn to & subscribed before me this 10th day of June, 1886.
J. W. PEARCE, *Clerk S. C.*

Endorsement: Circuit court of the United States, southern district of Georgia. George A. Cunningham, complainant, & The Macon & Brunswick R. R. Co., def'ts. Original notice. Filed June 21, 1886. M. Erwin, dep. clerk.

117 *Order to Make Henry Fink, Rec'v'r, a Party.*

In the Circuit Court of the United States for the Southern District of Georgia.

GEORGE A. CUNNINGHAM, Compl't,
vs.
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Defendant-.

The above-entitled case having come on for a hearing on the motion of the complainant to take a final decree of foreclosure against the said The Macon & Brunswick Railroad Company, and it appearing to the court that the railroad and other property on which said complainant seeks a decree of foreclosure are in the possession of Henry Fink as receiver of this court, it is ordered and adjudged by

the court that said motion to take a final decree as aforesaid in said case be not allowed, but without prejudice to the right of complainant to renew said motion after having made said receiver a party to said bill and motion and after due service thereof on said receiver.

Done in open court, at Macon, Georgia, 21st June, 1886.

EMORY SPEER, *Judge.*

Filed June 21, 1886.

M. ERWIN, *Dep. Clerk.*

118 *Order for Leave to File Supplemental Bill.*

In the Circuit Court of the United States, Southern District of Georgia.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co., Defendant.

Upon motion of complainant's solicitor it is ordered that the order granted at the April term, 1886, of this court requiring the complainant to make the receiver of the East Tennessee, Virginia and Georgia Railroad Company a party defendant to the bill of complaint be, and the same is, revoked; and leave is hereby granted to the complainant to file the supplemental bill herewith presented to the court in said cause making the East Tennessee, Virginia and Georgia Railway Company a party defendant without prejudice to any defense of said defendant to be made by way of demurrer, plea, answer, or otherwise.

Dec. 30, 1886.

EMORY SPEER,
U. S. Judge.

Endorsement: George A. Cunningham *vs.* Macon & Brunswick R. R. Co. Order for leave to file supplemental bill, &c. Filed Dec. 30, 1886. Marion Erwin, dep. clerk.

119 *Supplemental Bill.*

UNITED STATES OF AMERICA,
Southern District of Georgia, Eastern Division.

To the judges of the circuit court of the United States for the southern district of Georgia:

George A. Cunningham, a citizen of the State of Virginia, brings this his supplemental bill of complaint against the Macon & Brunswick Railroad Company, a corporation created by and existing under the laws of the State of Georgia, and the East Tennessee, Virginia and Georgia Railway Company, an incorporation created by and existing under the laws of the State of Tennessee and having an office and place of business in the city of Macon, in the said southern district of Georgia, wherein it transacts business through its duly authorized agent.

And thereupon your orator complains and says that in and of the November term, 1877, of this honorable court he exhibited his original bill of complaint against the said defendant, The
120 Macon & Brunswick Railroad Company, and others, upon behalf of himself and all holders of the second series of the bonds of the said The Macon & Western Railroad Company, endorsed by the State of Georgia, who might choose to be parties thereto and bear their *pro rata* of expense, and did join with the said The Macon & Brunswick Railroad Company Alfred H. Colquitt, William A. Lofton, Edward A. Flewellen, and divers others persons defendants thereto.

That in and by his said bill your orator claimed to hold a statutory mortgage to secure the sum of $19,000.00 and interest, evidenced by certain bonds of said The Macon & Brunswick Railroad Company on all the property of the said last-mentioned company owned by it at the time of the issuance of the said bonds of said company, alleged in said bill by your orator to be owned by him and issued by said company on the 1st day of November, 1870, and claimed a lien upon the said property in the hands of the said Edward A. Flewellen and others, holding the said property by authority of the governor of the State of Georgia, and prayed a foreclosure of the equity of redemption of said The Macon & Brunswick Railroad
121 Company in and to said property and a general judgment against said company; that the said Edward A. Flewellen and others demurred to your orator's said bill for want of jurisdiction of this honorable court as against him and others, and that the said The Macon and Brunswick Railroad Company appeared to the said bill; that the said bill was dismissed as to said Alfred H. Colquitt, William A. Lofton, and George S. Jones, defendants, and that at May rules, 1886, an order was entered up to take the said bill *pro confesso* as to the said defendant, The Macon and Brunswick Railroad Company, but no final decree has been made thereon; and your orator shows that in and by his said bill he stated that the said State of Georgia did on the second day of July, 1873, seize the said property of the said The Macon and Brunswick Railroad Company upon which your — had his statutory mortgage for the security of his said bonds, and that subsequently to said seizure, to wit, on the sixth day of March, 1875, the General Assembly of said State declared the endorsement of the said State upon that issue of bonds of the said Macon and Brunswick Railroad Company of which your orator's said bonds were a part unconstitutional, null,
122 and void, by resolution duly approved by the governor of said State, and did in and by the same series of resolutions order the said road to be sold by the governor upon such terms and for such price in money or first-mortgage endorsed bonds of the Macon and Brunswick Railroad Company, or bonds of the State, as in his judgment might be consistent with the interests of the State; that subsequently the said railroad property was illegally sold by the governor aforesaid to the said State of Georgia; that afterwards the said railroad property was sold by the said State of Georgia to the East Tennessee, Virginia and Georgia Railroad Company, who

purchased the same with full notice of all the acts and things hereinbefore mentioned, and especially with notice of the resolution aforesaid of the General Assembly of the State of Georgia, approved March 6th, 1875, and with notice of the original bill of your orator at the time of said purchase and now pending in this honorable court; and your orator further shows that the said railroad property hereinbefore mentioned as mortgaged by a statutory mortgage to your orator and his fellow-bondholders was subsequently, to wit, on the twenty-fifth day of May,
123 1886, sold as the property of the last-mentioned corporation to the East Tennessee, Virginia and Georgia Railway Company under and by virture of some proceeding of a judicial character to which your orator was not a party and the particulars of which are not known to him, and your orator avers that the said The East Tennessee, Virginia and Georgia Railway Company purchased the said property with full notice of all of the said matters and things and of the said resolution of the General Assembly of the said State of Georgia and of the bill of your orator then pending in this court.

And your orator charges that the said State of Georgia held the said property after the seizure thereof as a trust for the payment of the obligations of the said The Macon and Brunswick Railroad Company to the extent of the avails of a sale of the said property to be made for the interest of all creditors of said company, with the privilege unto the said State of protection, first, out of said avails, of its own endorsement of the bonds of said company; that the said State, in and by the resolution aforesaid, declared its
124 endorsement of the bonds held by your orator to be not binding on it, and in advance of demand upon it by your orator refused thereby to pay the said endorsement or to enforce its said privilege of protection of said endorsement from the avails of said property so in its hands; that your orator thereby became at least entitled to the advantage of the said mortgage lien of the said State for his protection; to have the said property sold with proper regard to his interests and the interests of his fellow-bondholders; to be allowed to participate freely with all other lienors of the said railroad at the sale of the said railroad property by his said trustee, in bidding upon said property and paying therefor in the bonds held by him, hereinbefore mentioned, with due regard to the protection of any and all prior liens and the costs and expenses of sale.

And your orator shows that in and by the said resolutions under which said sale was made and under color of which the said trustee for your orator became possessed of the said railroad property, the said State of Georgia gave notice of its intention to commit a breach of trust by excluding your orator from participation in said
125 sale on equitable terms with the holders of the first-mortgage bonds by excluding your orator, by the provisions thereof, from participation in the avails of said sale or any benefit therefrom by announcing openly to the world its intention to sell the said road in its own interest rather than in the interest of the creditors

of said company, and by divers other acts and announcements, all concurring to demonstrate positively to the world that the said trustee had determined to exclude your orator from any benefit under the said trust, and that it would not regard or protect in any respect the interests of your orator and his fellow-bondholders in the said sale or distribution of avails.

And your orator shows that in point of fact the said State of Georgia, at the said sale, did commit the said breach of trust according to its previously announced intention, did exclude your orator and his fellow-bondholders from their rights of equitable protection at sale by bidding and paying the bonds held by them, did sell the said road in a manner contrary to the interests of the creditors generally of the said road for a very small part of its real value,
126 the price nominally bid therefor being one million dollars and the real value thereof being four million dollars, and did sell the road to itself for said price in its own interest and without regard to the interests of the beneficiaries of the trust, including your orator, and thereupon in equity held the said property as a trust for your orator and subject to his lien for the payment of his said bonds.

And your orator avers that the said The East Tennesse, Virginia and Georgia Railroad Company and the East Tennessee, Virginia and Georgia Railway Company had full notice in the purchase of said property made by each of the said breach of trust by said trustee and took the said property subject to the duties and liabilities of said trustee towards your orator—that is to say, with the lien of your orator unaffected and undischarged by the sale of said property made by said trustee in breach of his fiduciary duty, and that the said last-mentioned company now holds said property as trustee for your orator and subject to your orator's lien for the payment of the said indebtedness to him.

127 To the end, therefore, that the said defendant The East Tennessee, Virginia and Georgia Railway Company may, if it can, show why your orator should not have the relief prayed and may full, true, direct, and perfect answer make to all and singular the premises (while your orator waives all and any answer under oath for the said defendant) and that your orator may have a decree of foreclosure of the equity of redemption of the said defendant in and to the said railroad property hereinbefore and in your orator's said original bill set forth for the sum of your orator's demand in his said original bill contained, and that your orator may have the full benefit of the said bill and proceedings therein against the said The East Tennessee, Virginia and Georgia Railway Company and may have the same relief against it as your orator might or could have had against the said Macon and Brunswick Railroad Company if the title to said property were still in the said Macon and Brunswick Railroad Company and that your orator may have such other and further relief as his case may require and to your
128 honor shall seem meet.

May it please your honor to grant unto your orator the writ of subpœna of the United States of America, issued out of and

under the seal of this honorable court, directed to the said The East Tennessee, Virginia and Georgia Railway Company, at a certain day and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there to stand to, abide, and perform such decree as to equity and justice shall appertain.

And your orators shall ever pray, &c.

WM. W. MONTGOMERY,
CHAS. N. WEST,
Compl't's Solicitors.

Endorsement.

In United States circuit court, southern district of Georgia. George A. Cunningham *vs.* Macon & Brunswick Railroad Company. Supplemental bill. Filed in accordance with order of court of this date, Dec. 30th, 1886. Marion Erwin, deputy clerk. Montgomery, West, compl't's sol's.

129 *Equity Subpœna to Appear and Answer.*

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK RAILROAD COMPANY and The East Tenn., Va. & Ga. Railway Co., Defendant-.

In Equity.
Supplemental Bill.

The President of the United States of America to the East Tennessee, Virginia and Georgia Railway Company, Greeting:

For certain causes offered before the judges of the 5th circuit court of the United States for the southern district of Georgia, in equity, you are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in February next, to answer to those things which shall then and there be objected to you in a supplemental bill of complaint, and to do further and receive what the said court shall have considered in that behalf, and this you may in no wise omit under penalty of five hundred dollars; and have here this writ.

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States this 31 day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Seal of the Court.

MARION ERWIN,
Deputy Clerk.

MEMORANDUM.—The defendant is to enter its appearance in the suit above stated in the clerk's office on or before the day at which

this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso.*

MARION ERWIN,
Deputy Clerk.

W. W. MONTGOMERY,
C. N. WEST, *Compl't's Sol's.*

130 **Endorsement:** In the circuit court of the United States for the southern district of Georgia. Feb'y rules, 1887. Geo. A. Cunningham, complainant, and The Macon & Brunswick R. R. Co. & East Ten., Va. & Ga. Railway Co., defendants. In equity. Subpœna in equity. Original. Issued 31st day of Dec., A. D. 1886. Marion Erwin, deputy clerk. W. W. Montgomery, C. N. West, complainant's solicitor-.

And afterwards, to wit, on the 15th day of January, 1887, came the marshal for the southern district of Georgia and made the following return to foregoing process, to wit:

Return of Marshal.

I herby certify that I, this the 15th day of January, 1887, personally served a copy of the within writ on T. H. Henly, ag't E. T., V. & Ga. Railway Co., at Macon, Ga.

LUCIUS M. LAMAR,
U. S. Marshal,
By W. P. CORBETT, *Deputy.*

131 *Equity Precept for Appearance.*

United States Fifth Circuit Court, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
MACON & BRUNSWICK R'D, THE EAST TENN., VA. & GA. R'Y CO., *et al.* } In Equity.

The clerk of this court will please enter our appearance as solicitors for the defendant The East Tenn., Va. & Ga. Railway Co. in the above-entitled cause.

Dated Feb'y 7th, 1887.

CHISHOLM & ERWIN,
Solicitors for The East Tenn., Va. & Ga. R'y Co., Defendant.

Equity Order for Appearance.

United States Fifth Circuit Court, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
MACON & BRUNSWICK R. R., THE EAST TENN., VA. & GA. R. R. CO. *et al.*, Defendant-. } In Equity.

On filing precept in this cause and on motion of Chisolm & Erwin—

Ordered that their appearance as solicitor- for defendant herein be, and the same hereby is, entered, and that the cause be now docketed for said defendant.

Witness the Honorable M. R. Waite, Chief Justice of the Superior Court of the United States, this seventh day of February, A. D. 1887.

Seal of the Court.

H. H. KING, *Clerk.*

132 Endorsement: U. S. fifth circuit court, southern district of Georgia. George A. Cunningham, complainant, and The Macon & Brunswick R. R. Co. & The E. T., Va. & Ga. R. R. Co. *et al.*, defendant-. In equity. Precept for appearance and order thereon. Filed and entered this 7th day of Feb'y, 1887. H. H. King, clerk. Chisholm & Erwin, solicitor- for defendant.

And afterwards, to wit, on the 5th day of March, 1887, the following proceedings were had:

133 *Order Extending Time to Answer, No.* 1.

In U. S. Circuit Court, Eastern Division, So. Dist. of Ga. In Equity.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*, Def'ts.

On motion of solicitors of The East Tennessee, Virginia and Georgia Railway Company, a defendant to the above-stated bill, and for good cause shown—

It is ordered that the time within which said defendant may plead, answer, or demur is hereby extended to the April rules, 1887.

In open court, March 5th, 1887.

EMORY SPEER, *Judge.*

Consented to.

C. N. WEST,
Compl't's Sol.

Endorsement: In U. S. circuit court, east. division, southern district of Georgia. George A. Cunningham, compl't, and The Macon & Brunswick Railroad Co. *et al.*, def'ts. Order extending time to plead, answer, or demur. Filed March 5th, 1887. M. Erwin, dep. clerk.

134 *Order Extending Time to Answer, No. 2.*

In U. S. Circuit Court, Eastern Division, Southern District of Ga.
In Equity.

GEORGE A. CUNNINGHAM, Compl't,
and
THE M. & B. R'D *et al.*, Def'ts. } In Equity.

On motion of solicitors for the East Tennessee, Virginia and Georgia Railway Company, one of the defendants in said cause, and for good cause shown—

It is ordered that the time within which said defendant may plead, answer, or demur in said cause is hereby further extended until the rules day in May next.

In open court, April 4th, 1887.

EMORY SPEER, *Judge.*

Endorsement: Circuit court of the United States, eastern division, southern dist. of Ga. Geo. A. Cunningham, complainant, *vs.* Macon & Brunswick R. R. Co. *et al.*, def'ts. Order extending time to plead, answer, &c., till May rules, 1887. Filed April 4th, 1887. M. Erwin, dep. clerk.

135 *Order Extending Time to Answer No. 3.*

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*, Def'ts.

On motion of Chisholm & Erwin, solicitors of The East Tennessee, Virginia and Georgia Railway Company, a defendant in the above-stated cause, and for good cause shown—

It is ordered that the time within which said defendant may demur, plead, or answer in said case is hereby extended until the rules day in June, 1887.

In open court, April 29, 1887.

EMORY SPEER, *Judge.*

I consent to the above.

CHAS. N. WEST.

Endorsement: Circuit court of the United States, eastern division, southern district of Georgia. George A. Cunningham, complainant, and The Macon and Brunswick R. R. Co Order extending time to demur, plead, or answer. Filed April 29, 1887. M. Erwin, dep. clerk.

136 *Order Extending Time to File Answer No. 4.*

In U. S. Circuit Court, Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. *et al.*, Def'ts.

On motion of the East Tennessee, Virginia and Georgia Railway Company and for good cause shown—

It is ordered that said defendant have until the rules day in July to plead, answer, or demur in the above-stated cause.

In open court, June 4, 1887.

EMORY SPEER.

Endorsement: Circuit court of the U. S., eastern division, southern dist. of Ga. George A. Cunningham, complainant, and The Macon & Brunswick R. R. Co., def'ts. Order extending time to plead, answer, or demur, &c. Filed June 4, 1887. M. Erwin, dep. clerk.

137 *Order Extending Time to File Answer No. 5.*

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK RAILROAD CO. *et al.*

On motion of solicitors for the East Tennessee, Virginia and Georgia Railway Company and for cause shown, it is ordered that said defendant may plead, answer, or demur in said cause at any time on or before the August rules, 1887.

July 2d, 1887.

EMORY SPEER, *Judge.*

Endorsement: In U. S. circuit court, east division, southern district of Georgia. George A. Cunningham, complainant, and The E. T., Va. & Ga. R. R. Co. *et al.* Def't's order extending time for filing answer, &c., by E. T., Va. & Ga. R'y Co. Filed in office July 4th, 1887. H. H. King, clerk.

Afterwards, to wit, on the 1st day of August, 1887, the defendants filed the answer of the East Tennessee, Virginia and Georgia Railway Company:

138 In the United States Circuit Court for the Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON AND BRUNSWICK RAILROAD COMPANY *et al.*, Defendants. } In Equity.

The Answer of the East Tennessee, Virginia and Georgia Railway Company.

Chisholm & Erwin, solicitors for the East Tenn., Va. & Ga. R'y Co.

Filed in clerk's office August 1st, 1887.

MARION ERWIN,
Deputy Clerk.

139 In the United States Circuit Court for the Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON AND BRUNSWICK RAILROAD *et al.*, Defendants. } In Equity.

The separate answer of the East Tennessee, Virginia and Georgia Railway Company to the bill and supplemental bill of complaint of George A. Cunningham.

This defendant, now and at all times hereafter, saving and reserving to itself all benefit and advantage of exception that can or may be had or taken to the manifold errors, uncertainties and insufficiencies of the said bill and supplemental bill of complaint, for answer thereunto, or to so much thereof as this defendant is advised it is material for it to make answer unto, answering, says:

It admits and avers that on or about the 3rd day of December, 1866, the legislature of the State of Georgia passed an act in re-
140 spect to the endorsement of the bonds of the Macon and Brunswick Railroad Company, and that on the 4th day of December, 1866, the said legislature passed a series of resolutions annexing certain conditions to said endorsement, and this defendant prays leave to refer to the said act and resolutions with the like effect as if the same were fully set forth herein; and it denies each and every averment in the bill of complaint contained in respect to the contents, purport and effect of said act and resolutions, except so far as upon inspection of said act and resolutions such averments may appear to be correct and true.

It admits and avers that after the passage of said act and said resolutions, and in pursuance thereof, the Macon and Brunswick Railroad Company, therein referred to, issued bonds at the rate of ten thousand dollars per mile, under the regulations prescribed by said act, to the amount of $1,950,000, upon which said bonds the

governor of the State of Georgia, under and in accordance with the provisions of said act, placed the endorsement of the said State of Georgia; and that the said bonds, with the State's endorsement thereon, were afterwards, and, as it avers, prior to the passage of the act approved October 27th, 1870, hereinafter referred to, negotiated and sold to various persons and parties for value; and it avers that at all times after said negotiation and sale of the said bonds, the whole thereof, amounting at their par or face value to the sum of $1,950,000, remained outstanding in the hands of *bona fide* owners and holders of said bonds until subsequent to the 19th day of February, 1877, when the whole of said bonds, except bonds to the amount of about $7,000 only, which have never been
141 presented to the State to be taken up by it, were taken up by the State, which paid full value for the same; and it avers that the title to all the property of every kind which was purchased with said bonds (which was at least one-half part in amount and value of all the railroad and property of the old Macon and Brunswick Railroad Company) vested in the State, under the provisions of said act approved December 3d, 1866; and that, by virtue of said act and its endorsement of said bonds, the State acquired and held a first lien to the amount thereof upon all the property of the said Macon and Brunswick Railroad Company.

It admits that said Macon and Brunswick Railroad Company did, on or about the 22nd day of June, 1870, execute a mortgage to the governor of the State of Georgia, and it believes the copy annexed to said bill of complaint as Exhibit A, is a true copy of said mortgage, and it refers to the said mortgage for its contents, purport and effect.

It admits that in the year 1870 the General Assembly of the State of Georgia passed an act in respect to the proposed endorsement of other bonds of the old Macon and Brunswick Railroad Company, which was approved on the 27th day of October, 1870, and it prays leave to refer to said act with like effect, as if the same was fully and at large set forth herein; and it denies each and every allegation in the bill contained in respect to the contents, purport and effect of said act, except so far as upon inspection of the said act the same may be found to be correct and true; but it avers, for the reasons hereinafter stated, that said act was wholly unconstitutional, null and void.

142 It has, since the filing of the said supplemental bill, been informed that before the passage of the said act of 1870, hereinbefore referred to, the old Macon and Brunswick Railroad Company issued bonds to the amount of $1,100,000, or thereabout, and to secure the same made and executed to Samuel A. Strang and James J. Goodwin, as trustees, a mortgage of all the road-bed and property of the said last-mentioned company, subject, however, to the lien created by the said act of 1866 to secure the endorsement of the bonds to the amount of $1,950,000, endorsed under its provisions; that these $1,100,000 of bonds were not endorsed by the State; that this defendant knows nothing concerning the execution of the same or of the so-called release, and does not know, nor is it informed,

save by the complainant's bill, whether the Exhibit B to complainant's bill is a copy of the said so-called release; and it avers upon information, that if any such paper as Exhibit B was ever executed by the trustees of said so-called second mortgage, it was with the consent of the holders of only a part, if any, of the bonds intended to be secured thereby; and it denies that any paper, of which Exhibit B purports to be a copy, or any such paper, could or did operate to postpone any lien which the holder of any bond secured by said mortgage may have had on the property therein described.

It admits that, after the passage of said act of 1870, the said Macon and Brunswick Railroad Company, in said act referred to, issued certain other bonds, amounting in all to $600,000, or thereabouts, which purported to be issued pursuant to said act, approved October 27th, 1870, and purported to bear the endorsement of the said State of Georgia, placed thereon by one Rufus B. Bulloch, governor
143 of said State; but it denies that said bonds were issued and endorsed after the said release had been executed; and it avers that if any indorsement was written on sueh bonds which purported to be the endorsement of the State of Georgia, such endorsement was wholly in violation of the constitution of the State of Georgia, and was null and void and of no effect whatever.

It avers that by the constitution of the State of Georgia then in force, it was provided that the credit of the State should not be granted or loaned to aid any company without a provision that the whole property of the company should be bound for the security of the State prior to any other debt or lien, except to laborers; nor to any company in which there was not already an equal amount invested by private persons; and it avers that if any endorsement was made, or attempted to be made, on behalf of the State of Georgia upon such bonds to the amount of $600,000, or thereabouts, or any of such bonds, it was made, or attempted to be made, without any provision that the whole property of the company should be bound for the security of the State therefor, prior to any other debt or lien except to laborers, and without such property being so bound; and it avers that there was not at any time in the year 1870, or subsequent thereto, an amount invested by private persons in said Macon and Brunswick Railroad Company equal to the amount of said $600,000, or thereabouts, in excess of the amount invested by private persons to authorize the issue of said bonds for $1,950,000, which had been theretofore endorsed by said State under said act of 1866, nor, as it is informed and believes, any amount whatsoever in excess of said amount of $1,950,000; and it avers that
144 said act, approved October 27th, 1870, and any endorsement or attempted endorsement of any bonds thereunder is, and was, wholly unconstitutional, null and void.

It admits that Exhibit C to said bill of complaint is a true copy of one of the issue of $1,950,000 of bonds endorsed under said act of 1866, but it has no knowledge or information, except such as may be gathered from the bill, as to whether Exhibit D to the said bill of complaint is a copy of one of the said $600,000 of bonds; and it denies that the said $600,000 of bonds were ever endorsed by

the governor and negotiated for a valuable consideration in December, 1870.

It admits that on or about the 14th day of October, 1872, the General Assembly of the State of Georgia passed the resolution averred in the bill; it denies that the complainant became after the "passage of said resolution of 1872 for a valuable consideration and in good faith, without any knowledge or notice whatsoever of any fraud or illegality in the issue or endorsement or of the failure of said company to comply with the terms upon which said endorsement was authorized by law, the holder of" the nineteen bonds specified in the bill, or of any or either of them. It does not know, and is not informed, save by complainant's bill, what complainant relied on in the purchase of any of said bonds; but it avers and charges that if the complainant became the holder of any of said bonds he held them charged with notice that the same were, and the alleged endorsement by the State was, null and void, as the said bonds were issued and endorsed in direct violation of the provissions of the constitution of the State of Georgia, hereinbefore averred.

145 It admits that on July 1st, 1873, and on November 1st, 1873, the said Macon and Brunswick Railroad Company failed to pay the coupons, as well upon the $1,950,000 series as upon the $600,000 series, and it admits that it has since continuously failed to pay the coupons thereon at maturity; and for the effect of any default upon any of the bonds of the old Macon and Brunswick Railroad Company, it prays leave to refer to the bonds themselves.

It admits and avers that in the month of July, 1873, James M. Smith, then governor of the State of Georgia, under and by virtue of the provisions of said above-recited act approved December 3rd, 1866, took possession of and seized the said Macon and Brunswick railroad in the name and behalf of the State of Georgia, and it avers that hereunto annexed, marked Exhibit A, is a copy of the proclamation by the said governor upon so taking possession of and seizing the said railroad, and that the statements of fact contained in said proclamation are true; but, it denies that the property mentioned in the alleged trust deed from said company to one L. N. Whittle was not covered by the said statutory and executed mortgages, so far as the $1,950,000 series of endorsed bonds are concerned, and it denies that said property was acquired by said company with funds other than the proceeds of said bonds, and it denies that said property was covered by any mortgage securing the payment of the $600,000 series of bonds; it avers that said property was purchased with the proceeds of some of said bonds of the $1,950,000 series.

It admits and avers that in 1875 the General Assembly of the State of Georgia passed certain resolutions in reference to
146 bonds of the Macon and Brunswick Railroad Company and other matters, which were approved on the 6th day of March, 1875, and it prays leave to refer to said resolutions with the like effect as if the same were fully and at large set forth herein; and it denies each and every allegation in respect to said resolutions in

complainant's bill of complaint contained, except so far as upon inspection of said resolutions the same may be found to be correct and true.

It admits and avers that the governor of the State of Georgia, after seizing said road, appointed Edward A. Flewellen to take charge of the Macon and Brunswick railroad, but it denies that such appointment was made immediately after the seizure, and avers that such appointment was not made until about the space of eighteen months after the said road had been seized.

It avers that on the first Tuesday in June, 1875, the said road was sold by the governor of said State, and that a copy of the executive order, directing the sale of said road, is annexed hereto and marked Exhibit B, and it prays leave to refer to the same with a like effect as if incorporated herein; and it avers that the statements contained in such order are true.

It admits that the said railroad and its franchises and all other property of said company was advertised under the said executive order to be sold on the first Tuesday in June, 1875, in the city of Macon, at the depot of the Macon and Brunswick railroad at public outcry, between the legal hours of sale, and that the advertisement of said sale stated that the said property would be offered for cash or bonds of the State, or the first-mortgage bonds of the company endorsed on behalf of the State under authority of the
147 act approved December 3d, 1866: but it has no knowledge or information sufficient to form a belief that on the day of sale the said governor caused it to be announced that the said mortgage bonds would only be received at their then market value, and it therefore controverts said allegation; and it denies that the bonds endorsed under said act of December 3d, 1866, were much below their par value at that time; it denies that said railroad was sold below its true value, but on the contrary it avers that the price at which it was sold was the full value of said property; it has no knowledge or information sufficient to form a belief as to what the judgment of the said Flewellen may have been in regard to the time for sale, or mode of sale, and it avers that whatever his judgment may have been on this, or any other subject, is entirely immaterial. It has no knowledge or information sufficient to form a belief that the holders of bonds endorsed by the State under said act of 1866 were in any way deterred from bidding on said property, or if they had been permitted to pay for said property with bonds endorsed by the State under said act and held by them, they would have paid a much higher price than said property brought; and it therefore controverts such allegations.

It denies the allegation that the said governor in making the said sale did not do so in such a manner and at such time as in his judgment would best subserve the interest of all concerned, but at such time and in such manner as in the judgment of said governor was most detrimental to said bondholders, and each and every part of such allegation, and on the contrary it avers that such sale
148 was made by said governor in such manner and at such time as in his judgment would best subserve the interests of all concerned.

It has no knowledge or information sufficient to form a belief that said railroad was sold in the face of said Flewellen's warning to said governor that the time and manner of such sale was most unfortunate, and denies the materiality of any such allegation, and it has no knowledge or information sufficient to form a belief as to whether it was so admitted in any letter from said governor to said Flewellen, or whether the paper marked Exhibit F, annexed to the bill of complaint, is, or is not, a copy of any letter written by James M. Smith to the said Flewellen, and it avers that if any such letter ever was written it was not an official letter and is wholly immaterial to this controversy, and cannot in any way control or affect the official order of the governor, dated April 5th, 1875, above referred to.

It admits that the said sale took place as advertised and the entire property was sold, as above stated, and was bid in and bought by the governor in the name of and for the State; that a deed of said property was duly made and executed, a copy of which is attached to the bill and marked Exhibit G; that the price paid for said property was the sum of $1,000,000; but it denies that said sum was in any way a nominal sum; and it avers that prior to said sale and purchase two certain acts had been passed by the General Assembly of the State of Georgia in respect to the purchase by the governor in the name of and for the said State of railroads sold on account of non-payment of interest accruing on bonds endorsed by said State, and that said acts were approved February 17th,
149 1873, and March 5th, 1875, respectively; and it prays leave to refer thereto with like effect as if the same was herein fully and at large set forth. That by reason of such sale and purchase, and such deed of conveyance of the property so sold, the State of Georgia, then and there, became, and at all times thereafter continued to be, until the sale made by it as hereinafter averred, the sole and absolute *bona fide* owner of said property in fee simple, and lawfully entitled to sell and convey the same to a purchaser thereof free from and discharged of any lien, trust or encumbrance whatsoever.

It denies that said act of 1870 opened said statutory mortgage and said mortgage executed by the Macon and Brunswick Railroad Company to the governor of the State of Georgia, or either of them; and it denies that said act gave to the $600,000 of bonds a lien upon the Macon and Brunswick railroad.

It denies that the State of Georgia held the said property, after the seizure thereof, as a trust for the payment of the obligations of the said Macon and Brunswick Railroad Company, to the extent of the avails of a sale of said property to be made for the interests of all the creditors of said company, with the privilege unto the State of a protection first out of said avails of its endorsement of the bonds of said company.

It denies that complainant became, or was, entitled to the advantage of the said mortgage lien of the said State for his protection; it denies that complainant had any right to bid upon the

property at the sale made by the governor, and to pay therefor in bonds of the $600,000 issue; and it denies that said property was, at the time of said sale, of the value of over $4,000,000; it avers that $1,000,000 was then the full value of said property; and it denies that the State, at any time, held said property as a trust for complainant, or subject in any manner to any lien.

It admits that said State received the earnings of said road while it was in its possession, and paid the net earnings of said road into the treasury of said State and did not apply the same to the payment of the principal or interest of bonds issued under said act of October 27th, 1870; but it avers that after the State took possession of said road in July, 1873, it regularly paid the interest accruing upon the bonds to the amount of nineteen hundred and fifty thousand dollars, indorsed under the act of December 3rd, 1866, and that the amount so paid for such interest largely exceeded the amount of any earnings of said railroad.

It avers that on the 1st day of May, in the year 1877, the people of Georgia, at a special election held in accordance with law, adopted an amendment to the existing constitution of the said State, to which this defendant prays leave to refer with the like effect as if it were here fully and at large set forth; and that by the present constitution of the State of Georgia, adopted by a majority vote of the people of said State, at an election lawfully held for the said purpose, on the 5th day of December, 1877, it was provided as follows:

"SECTION 2, paragraph 1. The general assembly shall have no authority to appropriate money, either directly or indirectly, to pay the whole or any part of the principal or interest of the bonds or other obligations which have been pronounced illegal, null and void by the General Assembly and the constitutional amendments, ratified by a vote of the people on the 1st day of May, 1877; nor shall the General Assembly have authority to pay any of the obligations created by the State under laws passed during the late war between the States; nor any of the bonds, notes, or obligations made and entered into during the existence of said war, the time for the payment of which was fixed after the ratification of a treaty of peace between the United States and the Confederate States; nor shall the General Assembly pass any law, nor the governor or other State official enter into any contract or agreement, whereby the State shall be made a party to any suit in any court of this State, or of the United States, instituted to test the validity of any such bonds or obligations."

And that, by another section of said constitution, it is provided:

"SECTION 13, paragraph 1. The proceeds of the sale of the Western and Atlantic, Macon and Brunswick, or other railroads held by the State and any other property owned by the State, whenever the General Assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the State, and shall not be used for any other purpose whatever so long as the State has any existing bonded debt; provided, that the pro-

ceeds of the sale of the Western and Atlantic railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds."

It avers that in the year 1879, the General Assembly of the State of Georgia passed an act, approved on the 3rd day of September, 1879, and that afterwards the said General Assembly passed a further act, approved October 14th, 1879, in respect to the lease and sale of the railroad and property described in exhibits annexed to this answer, to which the usual leave of reference is prayed, and this defendant prays leave to refer to said acts with the like effect as if they were here fully and at large set forth.

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It avers that, on the 13th day of January, 1880, said railroads and other property was put up to be leased, under the said acts approved September 3rd, 1879, and October 14th, 1879, at public outcry, in the city of Macon, county of Bibb, and State of Georgia; and that the lease thereof was duly bid off by James M. Couper, he being the highest and best bidder for the same; and that he thereafter assigned his said bid and all his rights and interests therein, or to the lease of said road, to himself (the said Couper), Geo. H. Hazelhurst, A. J. Lane and William M. Johnston; and that thereafter, on or about the 28th day of February, 1880, said names were enrolled upon the minutes of the executive department of said State, as will more fully appear by reference to the executive order, a copy of which is annexed to this answer and marked Exhibit C, to which the usual leave of reference is prayed. And it avers that thereupon and thereby, under the sixth section of said act, approved September 3rd, 1879, they became a body politic and corporate, under the name and style of the Macon and Brunswick Railroad Company.

It avers that the bond prescribed by the said act, approved September 3rd, 1879, was duly given and filed, and that all the other steps and proceedings required by said act, and by the act approved October 14th, 1879, were duly taken; and that thereupon and under and by virtue of and in accordance with the provisions of said acts, a lease was duly executed to said last named Macon and Brunswick Railroad Company, a copy whereof is annexed to this answer and marked Exhibit D, to which the usual leave of reference is prayed. And that afterwards, and on the same day, said company availing itself of the right granted by the said acts, purchased, in good faith, the said road from the said State, together with all the property, effects, rights, and appurtenances thereof; and, on the same day, the said governor passed an executive order, directing a deed of the said railroad and other property, effects, rights and appurtenances to be executed to the said last-named company; and that thereupon, and on the said day, a deed of conveyance of said railroad, property, effects, rights and appurtenances was executed by the said State of Georgia, by Alfred H. Colquitt, governor, to said company, as appears by copies of said executive order and said deed attached to this answer and marked Exhibits E and F, respectively, to which the usual leave of reference is prayed; and it avers that, by such purchase and conveyance,

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said company thereupon became the owner of such railroad and other property, effects, rights and appurten-ces, free and discharged of and from any lien, trust or incumbrance whatever, except only the liens and conditions in favor of said State, prescribed in said acts of September 3rd, 1879, and October 14th, 1879; and it avers that thereafter, and on the 1st day of March, 1880, said last-named company was, by the officers of the said State of Georgia, placed in possession, in behalf of itself, of the said railroad and the said property purchased from the said State; but, it avers that the
154 said railroad and property was in the hands of said company, subject to the liens and conditions reserved in favor of the said State of Georgia by the provisions of said acts approved September 3rd, 1879, and October 14th, 1879, respectively, to which acts reference is hereby made in that behalf.

It avers that said last-named Macon and Brunswick Railroad Company, from the 1st day of March, 1880, until the 14th day of June, 1881, remained in possession of said railroad and property and all its franchises and appurtenances, subject only to the lien in favor of the State of Georgia, mentioned in the said deed of conveyance, dated February 28th, 1880; that, on the 14th day of June, 1881, said last-named company sold and conveyed to the East Tennessee, Virginia and Georgia Railroad Company, a corporation duly created and organized under the laws of the State of Tennessee, the said railroad and property, besides such betterments and additions as has been made to the plant by said last-named Macon and Brunswick Railroad Company, for the consideration and under the terms and conditions set forth in the deed of conveyance, a copy of which is hereunto annexed as Exhibit G, to which the usual leave of reference is prayed.

It avers that on the said 14th day of June, 1881, the said East Tennessee, Virginia and Georgia Railroad Company purchased and went into possession of said railroad and property, and all its franchises and appurtenances in good faith, and so held the same, subject only to the liens mentioned in said last-named deed, continuously until the 30th day of September, 1881, on which date it sold and conveyed to the said Macon and Brunswick Rail-
155 road Company of 1880 the said railroad and property for the considerations and under the terms and conditions set forth in the deed of conveyance, a copy of which is hereto annexed as Exhibit H, to which the usual leave of reference is prayed.

It avers that on the said 30th day of September, 1881, said last-named company purchased and went into possession of said railroad and property, and all its franchises and appurtenances in good faith, and so held the same subject only to the liens mentioned in said last-mamed deed until the 4th day of November, 1881, when it sold and conveyed the same unto the Cincinnati and Georgia Railroad Company, a corporation duly created, organized and existing under the laws of the State of Georgia, for the considerations and under the terms and conditions set forth in the deed of conveyance, a copy of which is hereto annexed as Exhibit I, to which the usual leave of reference is prayed.

It avers that on the said 4th day of November, 1881, said last-named company purchased and went into possession of said railroad and property, and all its franchises and appurtenances in good faith, and so held the same, subject only to the lien mentioned in said last-named deed, until the 30th day of December, 1881, when the said Cincinnati and Georgia Railroad Company sold the same to the said East Tennessee, Virginia and Georgia Railroad Company for the considerations and under the terms and conditions set forth in the deed of conveyance, a copy of which is hereto annexed as Exhibit K, to which the usual leave of reference is prayed.

It avers that on the said 30th day of December, 1881, said
156 last-named East Tennessee, Virginia and Georgia Railroad Company, purchased and went into possession of said railroad and property, and all its franchises and appurtenances in good faith, and held the same subject only to the lien mentioned in said last-named deed, and to such other liens as it created thereon until the — day of ——, 1885, when all the said railroad property, appurtenances and franchises, besides other property of said last-named company, were seized and taken possession of by Henry Fink, as the receiver, appointed by and under the interlocutory decree of the circuit court of the United States for the eastern district of Tennessee, granted and passed in a certain suit in equity then pending in said court, in which the Central Trust Company, of New York, was the complainant, and said East Tennessee, Virginia and Georgia Railroad Company, and others, were defendants.

It avers that said receiver held possession until the 1st day of July, 1886; that such proceedings were thereafter had in said cause, that under the decree and supplemental decree, granted and passed therein by said court on the 18th day of March, 1886, and the 26th day of April, 1886, and also under the order of said court, passed May 19th, 1886, all the said railroad, property, franchises and appurtenances, besides other property of the defendant in said suit, were, on the 25th day of May, 1886, sold by the special master appointed by said court to make the sale, to Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappen, George Warren Smith, Edmund W. Corlies and Robert Fleming, as purchasing trustees; that said Fleming thereafter duly assigned his interest in the purchase to said Frederick P. Olcott; that said sale was
157 duly confirmed by said court, and on the 28th day of June, 1886, a conveyance of said railroad, property, franchises and appurtenances was made by said special master to said Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappen, George Warren Smith and Edmund W. Corlies as purchasing trustees, who elected a board of directors, and on the 30th day of June, 1886, said directors assembled at Knoxville, Tennessee, and duly formed a corporation under the name of the East Tennessee, Virginia and Georgia Railway Company, in pursuance of the statute of the State of Tennessee, entitled "An act as to the sale of railroads under mortgage; granting certain powers to purchasers, and authorizing incorporation of purchasers," approved March 16th, 1877. That said purchasing trustees on the 1st day of July, 1886,

conveyed unto said corporation last named, this defendant, all the said railroad property, franchises and appurtenances, and this defendant at once entered into possession of the same in good faith and has since continuously so remained in possession of the same, subject only to the liens, terms and conditions named and provided for in said last-mentioned conveyance; and it attaches as Exhibit L, to which the usual leave of reference is prayed, a copy of the decree under which said railroad, property, franchises and appurtenances were sold, the reports of the special master who conducted the sale, the decree confirming the sale, the conveyance made by said special master to said purchasing trustees, the certificate of incorporation of this defendant, and the conveyance made by said purchasing trustees to this defendant.

It avers that the State of Georgia, said corporations and
158 Henry Fink, receiver, held their respective possessions of said railroad, property, franchises and appurtenances adversely, publicly, continuously, exclusively, uninterruptedly, peaceably, under a claim of right and under the respective deeds of conveyances and the interlocutory decree of the court, hereinbefore mentioned, for a period of more than seven years before the filing of complainant's supplemental bill, that is to say, from the first Tuesday in June, 1875, when the State of Georgia became the purchaser, until the 30th of December, 1886, when said supplemental bill was filed, and this defendant has acquired thereby a valid prescriptive title to said property; and it prays the same benefit of this defense as if it had been made by plea.

It avers that said State, and each of said corporations, purchased said railroad, property franchises and appurtenances at the respective times and for the respective considerations hereinbefore averred, without notice of the complainant's claims and without notice of the acts, matters and things charged in complainant's bill and supplemental bill.

It avers that it purchased said railroad, property, franchises and appurtenances at the time hereinbefore averred without notice of the complainant's claims and without notice of the acts, matters and things charged in complainant's bill.

And this defendant further answering, says: That it and its predecessors in the title to said railroad, franchises and appurtenances, commencing with the Macon and Brunswick Railroad Company, incorporated in 1880, placed betterments and improvements upon said property which cost millions of dollars; that they did so
159 acting under the belief that they were the owners of the same, and without notice of complainant's claims; that the said complainant well knew that the said betterments and improvements were being placed upon the property, but took no steps to enforce his alleged claims against said owners, or to give to said *bona fide* purchasers notice that he intended so to do; and this defendant charges that the complainant by such laches lost every right which he might otherwise be entitled to have against this defendant; and it prays the same benefit of this defense as if it had been taken by plea or demurrer.

This defendant, further answering, says that, inasmuch as the lien under said act of December 3rd, 1866, was vested in and held by a sovereign State of the United States, and said State, by its governor, sold the railroad and other property therein referred to, and became the lawful owner thereof, and afterwards sold the same to the Macon and Brunswick Railroad Company of 1880, upon legal and valuable considerations paid in good faith therefor, in reliance upon the State's power and right to make such sale, and, as the only interest claimed by the complainant is an alleged beneficiary of an alleged trust, which he claims that the State held as trustee for himself and others, and as his claim is based upon allegations of breach of trust or fraud, or both, on the part of said State, this defendant insists that no such breach of trust or fraud can be, in law, imputed to said sovereign State, nor can the sale and conveyance of said property be impeached by the complainant in this court upon any such grounds; nor can this court inquire into such alleged breach of trust or fraud upon the part of said sovereign State.

160 And it says that if the court should set aside such sale made by the State to the Macon and Brunswick Railroad Company of 1880, it must leave the State still liable to this defendant for the purchase-money paid to the State for said property, and for the betterments and improvements placed upon the property, for which, however, no decree could be given by this court in favor of this defendant against the said State, and the original lien of said State, with all its incidents, would be revived with the legal and equitable rights prescribed in the said act of 1866. And it avers that the State, by reason of its having taken up, as hereinbefore alleged, nearly all of said bonds endorsed under said act of December, 1886, would have an interest in the enforcement of such lien to an amount much greater than the value of the property affected thereby, and no other person or party would have any interest whatever therein, and it insists that this court has not jurisdiction to remove a State from, or to deprive it of, the administration of said lien, nor to take any property affected by such lien, or its income, or any part thereof, out of the hands or control of the said State.

That the State of Georgia is an indispensable party to this suit, without whose presence as a party in the cause the complainant cannot, and could not in any event, have or be entitled to the relief or decree sought by his bill, or any part thereof, nor any relief or decree against this defendant upon or in respect of the matters in the bill alleged; and this defendant hereby takes the objection that the State of Georgia is such an indispensable party, and prays the benefit thereof, not only as an objection by answer, but

161 likewise with the like effect as if taken by plea or demurrer.

And if, as the defendant admits to be the case, the Constitution of the United States prohibits the complainant from suing the State of Georgia as a defendant in this court, and prohibits this court from taking jurisdiction of any such suit, this defendant submits, inasmuch as the State of Georgia is an indispensable party as aforesaid

to the legal determination or adjudication upon the matters in controversy, or sought to be drawn into controversy in this case, or any of the same, that thereby the jurisdiction of the court over the suit and over the matters in controversy, or sought to be drawn into controversy, therein fails, and is and must be ousted by reason of the failure or inability to bring the State of Georgia in as a party; and it prays the benefit of this objection, not only as if taken by answer, but as if taken by plea, demurrer or otherwise howsoever. And this defendant submits that, inasmuch as the State of Georgia is an indispensable party to this suit, its non-suability cannot give the court jurisdiction to proceed in the suit without its presence, and cannot authorize the court to take out of the hands or control of the State, without having it a party before the court, any statutory lien vested in or possessed by it; nor the management thereof; nor any property upon which such lien exists; nor the State's right of entry; nor in anywise to divert or interfere with the State's execution and enforcement of said lien, or the rights or interests which are legally vested in the said State; nor to give to the complainant any other relief in respect to the case made, or attempted to be made, by the said bill and supplemental bill.

162 And it claims and insists that complainant, by his said bill of complaint, has not made such a case as entitles him to the relief prayed for, or to any relief whatever.

And this defendant having fully answered, prays to be hence dismissed with its reasonable costs in this behalf sustained.

CHISHOLM & ERWIN,
Solicitors for the East Tennessee, Virginia and Georgia R'y Co.

163 EXHIBIT A.

EXECUTIVE DEPARTMENT,
ATLANTA, GA., *July* 2, 1873.

Whereas, I have been informed by Annie A. Green that she is the holder of bonds of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia, under the provisions of an act entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes," approved December 3, 1866, in the amount of one thousand dollars; and, also, by D. F. Gunn that he is the holder of bonds of said company, endorsed as aforesaid, in the amount of twenty thousand dollars; and by the representative of the estate of John A. Vigal that he, also, holds bonds of said company in the sum of twelve thousand dollars, endorsed as aforesaid; and by W. C. Carswell, that he holds the bonds of said company, endorsed as aforesaid, in the sum of eleven thousand dollars; and by the Masonic Insurance Company that it, also, holds the bonds of said company, endorsed as aforesaid, in the sum of twelve thousand five hundred dollars; and by Daniel Bullard that he, also, holds the bonds of said company, endorsed as aforesaid, in the sum of six thousand dollars; and,

Whereas, I have been further informed, by the said holders of

the bonds aforesaid, that they have respectively presented the coupons for the semi-annual interest on said bonds, due on the 1st day of July, 1873, to said company for payment, and that payment therefore has been refused; and,

Whereas, by the second section of the said act it is made the duty of the governor, in the event that any interest due on the
164 bonds of said company, endorsed as aforesaid, shall not be paid by said railroad company at maturity, to seize and take possession of all the property of said railroad company, and apply the earnings of said road to the extinguishment of said interest, and to sell the road and its equipments and other property belonging to said company, in such manner and at such time as, in his judgment, may best subserve the interest of all concerned; therefore,

I, James M. Smith, governor of said State, do issue this my proclamation, making known that I have this day seized and taken possession of all the property of the said railroad company, to the end that the same, together with all the earnings of the said railroad, may be held, applied and disposed of as is required by the provisions of said act; and that George H. Hazlehurst, of the county of Bibb, has been appointed the agent of the State, to receive, hold possession of, manage and control all the property of said company, for the purposes hereinbefore stated.

Given under my hand and the great seal of the State, at the capitol in Atlanta, the 2nd day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh.

By the governor:

JAMES M. SMITH, *Governor.*

N. C. BARNETT,
Sec'y of State.

165 EXHIBIT B.

EXECUTIVE DEPARTMENT,
ATLANTA, GA., *April* 5, 1875.

Whereas, by virtue of the authority given in the second section of an act, entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes," approved December 3rd, 1866, an order was issued from this department, on the 2nd day of July, 1873, seizing and taking possession of all the property of said railroad company, and placing the same in the hands of an agent of the State, to be held managed and the earnings applied in accordance with the provisions of said second section of said act; and

Whereas, among other provisions of said second section of said act, it is expressly provided that after the seizure of all the property of said company, as aforesaid, the governor "shall sell the road and its equipments and other property belonging to said company, in such manner and at such times as, in his judgment, may best subserve the interest of all concerned;" and having become satisfied that it will be for the best interest of the State and all con-

cerned that all the property of the company seized under said order be sold at an early day, it is therefore

Ordered, that all the property seized, as aforesaid, now in the possession of Edward A. Flewellen, receiver of the property of the Macon and Brunswick Railroad Company, under said order, be sold to the highest bidder at public outcry at the depot of the Macon and Brunswick Railroad Company, in the city of Macon, be-
166 tween the hours of 10 o'clock a. m. and 4 o'clock p. m., on the 1st Tuesday in June next.

The said sale will be made for cash, for bonds of this State, or the first-mortgage bonds of the company, endorsed in behalf of the State, under the authority of the act approved December 3, 1866. It is further

Ordered, that the said Edward A. Flewellen, as receiver aforesaid, make out an advertisement under this order, setting forth with requisite particularity all the property to be sold as aforesaid, and publish the same in such public gazettes in this State and in the city of New York as, in his judgment, will give proper publication to said sale.

Given under my hand and the seal of the executive department, at the capitol in Atlanta, the day and year above written.

By the governor:

JAMES M. SMITH, *Governor.*

J. W. WARREN, *S. E. D.*

167 EXHIBIT C.

EXECUTIVE DEPARTMENT,
ATLANTA, GA., *February* 28, 1880.

Whereas, on the 13th day of January last the Macon and Brunswick railroad, the property of the State, was exposed at public outcry in the city of Macon, Georgia, for lease for the term of twenty years, under the provisions of an act entitled "An act to authorize a lease or sale of the Macon and Brunswick railroad, and to convey certain chartered powers and privileges upon the lessees of said road, to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same, and to prescribe their powers and duties, and for other purposes," approved September 3d, 1879; and

Whereas, at said leasing James M. Couper, for himself and his associates, bid the sum of one hundred and ninety-four thousand dollars ($194,000), which was the highest and best bid then and there offered, and said road was accordingly knocked off to him, of which sum ten thousand dollars ($10,000) was paid to the governor by said Couper on said day; and

Whereas, the said James M. Couper and his associates have this day tendered a bond with ample security, in the sum of five hundred thousand dollars ($500,000) conditioned for the faithful performance of their duties as lessees of said road as the same are prescribed and required by said act, which said bond has been ac-

cepted by the governor, in accordance with the provisions of the sixth section of said act, it is therefore,

168 Ordered, that the names of the said James M. M. Couper and associates, lessees as aforesaid, be entered on the minutes of the executive department, as follows:

James M. Couper, of Brunswick, Georgia; Geo. H. Hazlehurst, of Dade county, Georgia; A. J. Lane, of Bibb county, Georgia, and W. M. Johnston, of New York city, and because said lessees met in the city of Atlanta on the 12th day of February, 1880, for the purpose of consummating said lease and the same not being then concluded, it is ordered, that this order is made now for then.

By the governor:

ALFRED H. COLQUITT, *Governor.*

J. W. WARREN, *S. E. D.*

169 EXHIBIT D.

This indenture made and entered into the twenty-eighth day of February, in the year one thousand eight hundred and eighty, by and between the State of Georgia, acting by and through Alfred H. Colquitt, its governor, party of the first part, and the Macon and Brunswick Railroad Company, a corporation created under and in pursuance of the laws of the said State of Georgia, on or about the — day of February, one thousand eight hundred and eighty, party of the second part, witnesseth—

Whereas, the Macon and Brunswick railroad, which is now the property of the party of the first part, with all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character were, pursuant to advertisement, offered for lease on the sixth day of November, eighteen hundred and seventy-nine, in the city of Macon, pursuant to the act of the legislature of the State of Georgia, entitled An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the "lessees of said road to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same and to prescribe their powers and duties and (*and*) for other purposes," approved September the 3d, 1879. And pursuant to another act of the legislature of the said State, entitled "An act to alter and amend

170 an act entitled An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the lessees of said road, to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same, to prescribe their powers and duties, and for other purposes," approved September 3d, 1879, approved October 14th, 1879; and

Whereas, the legal hours of sale expired before the bidding ceased and while bids were pending and before the highest bid made was or could be recognized, and before the highest bid obtainable was

received, and it having been then announced by the governor that the lease of said road had not been effected, but the same was then and there withdrawn and would be readvertised for lease on a future day; and

Whereas, there was thus a failure to lease said railroad with such appurtenances, — was thereafter readvertised for lease under and in pursuance of the terms and provisions of the acts above mentioned, at the court-house in the city of Macon, within the legal hours of sale on Tuesday, the 13th day of January, 1880, and from day to day, in the discretion of the governor, until the property should be leased upon the terms and conditions of said acts; and

Whereas, forty-five days' previous notice of the day and place of said lease with the terms of the same was given by the governor of the State of Georgia in at least five newspapers of most general circulation in the State of Georgia, and in at least two other
171 newspapers of general circulation published in some of the cities of other States of the United States; and

Whereas, under and in such readvertisement, the said railroad with all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character, was exposed for lease to the highest bidder, not disqualified under the terms of the said act of September 3d, 1879, at public outcry in the city of Macon, at the court-house door of Bibb county, within the legal hours of sale on said 13th day of January, 1880, and the highest bidder for the said lease was James M. Couper, who bid therefor the sum of $194,000 per annum, which said sum was the largest sum in anywise bidden for the same; and

Whereas, the said lease of the said railroad and all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character, under the said acts, was at such sale struck off to said James M. Couper, at the price of $194,000 per annum, and said Couper on the said 13th day of January, 1880, paid $10,000 to the party of the first part on account of the rental of such property for the first year; and

Whereas, said Couper has assigned his said bid and his rights and interest in, to and in respect to a lease of said road to the said Couper, and George H. Hazlehurst, A. J. Lane and Wm. M. Johnson, whose names have been entered on the minutes of the executive department of the State of Georgia, under and in pursuance of the provisions of section 6 of the above-mentioned act, approved September 3d, 1879, and they and their successors have thereby become a body corporate and politic for the period of twenty years, under the name and style of the Macon and
172 Brunswick Railroad Company, and as such have all the rights, powers and privileges granted to the said road by the laws now in force; and

Whereas, the said lessees are worth over and above their indebtedness at least $150,000, and the said governor of Georgia has required the said company to give bond, with ample security, in the sum of $500,000, including in the State for at least $100,000, and the (*and the*) balance of said security is upon real estate or railroad

property, and said security is not even doubtful, the said bond binding the lessees and their securities for the prompt payment of the sum agreed on, according to the terms in said act stated, and for the return of the said road and its appurtenances at the expiration or termination, or forfeiture of the lease, if sale thereof, under said act, shall not be sooner made, in as good condition as it was when received by said company from the State under said lease.

Now, therefore, this indenture witnesseth that in consideration of the premises and of $194,000 paid to the party of the first part, the receipt whereof by said party of the first part is hereby acknowledged, the said party of the first part hath letten, and doth grant, demise and to favor let unto the said party of the second part, the Macon and Brunswick railroad, which is the property of the State, with all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character, until the 3d day of September, 1899, at the yearly rent or sum of $194,000 to be paid pursuant to the terms and provisions of the acts above referred to; that is to say, $10,000 having been paid on the 13th day of January, 1880, on account of the rental thereof for the first year, $184,000,
173 the balance of the rental for the first year, having been paid prior to the execution hereof, and after the first year one-twentieth of the annual rent is to be paid monthly, in advance, and within five days after the beginning of each month, into the treasury of the State of Georgia.

In case said party of the second part should at any time fail or refuse to pay the sum due for each month, according to the foregoing terms, this lease shall be forfeited, and it shall be the duty of the governor of the State of Georgia to declare it so forfeited, and to take immediate possession of said road and all the appurtenances and expel the lessees who have failed to make the payment according to the terms hereinbefore stated; but the faith of the State is hereby pledged to the said party of the second part that it shall in no case be disturbed by the authority of the State so long as it keeps the contract on its part and makes the payments when due. Provided, nevertheless, that the party of the second part shall in no case sublet said road to other corporations, except when allowed by legislative enactment; and provided, further, that nothing herein contained shall convey by lease any lots of land on or near the line of said railroad in the counties of Pulaski, Dodge and Wayne, now owned by the State, except such portions thereof as may be necessary for the operation of said railroad. And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent as aforesaid, shall and may peaceably and quietly have and hold and enjoy the said demised premises for the term aforesaid. This lease is made and executed under and in pursuance of the terms and provisions of the two acts of the legislature of
174 the State of Georgia above recited, approved on the 3rd day of September and the 14th day of October, 1879, respectively. And said party of the second part, at any time after the execution of these presents, shall have the privilege of purchasing said demised premises upon the terms stated in said acts, to wit: for the

sum of $1,125,000, to be paid as in said acts prescribed, and upon compliance by the party of the second part with the terms of said acts, the governor of the State shall transfer to said party of the demised premises and all other things attached thereto. In the event the Macon and Brunswick road should be purchased by the party of the second part at any time before the expiration of the first of this lease, upon application of said party of the second part when it may become purchaser, it shall be the duty of the treasurer of the State of Georgia, on the approval of the governor, to pay back to the said party of second part so becoming the purchaser, the excess over and above the *pro rata* rental arising while the said Macon and Brunswick railroad is run by said party of the second part as lessees, provided that the provisions of this paragraph shall also apply to any monthly rent paid in advance after the first of said year.

In witness whereof, the party of the first part hath hereunto set its great seal and caused these presents to be signed by Alfred H. Colquitt, its governor, and countersigned by N. C. Barnett, its secretary of state; and the party of the second part hereunto set its corporate seal and caused these presents to be signed by its president and attested by its secretary the day and year above written.

175 { Great Seal of the State of Georgia. } { Corporate Seal of Macon and Brunswick R. R. Co. }

ALFRED H. COLQUITT,
Governor of Georgia.
W. M. JOHNSTON,
Pres't Macon and Brunswick R. R. Co.
GEO. H. HAZLEHURST,
Sec'y Macon and Brunswick R. R. Co.

Signed, sealed and delivered in presence of—
I. W. AVERY.
JNO. RHEA., *N. P., ex Officio J. P.*
N. C. BARNETT, *Secretary of State.*

176 EXHIBIT E.

EXECUTIVE DEPARTMENT, STATE OF GEORGIA,
ATLANTA, GA., *February 28th*, 1880.

Whereas, James M. Couper, Geo. H. Hazlehurst, A. J. Lane and W. M. Johnson, lessees of the Macon and Brunswick railroad under the provisions of an act "to authorize the lease or sale of the Macon and Brunswick railroad," approved September 3d, 1879, availing themselves of the right and option granted in the 13th section of said act, of purchasing said road for the sum of one million, one hundred and twenty-five thousand dollars, ($1,125,000) to be paid in the recognized bonds of the State of Georgia, and have paid into the treasury of said State two hundred and fifty thousand dollars in the four per cent. bonds of the State of Georgia, as the first payment of said purchase, as provided in said 13th section of said act,

it is ordered, that a deed be executed in conformity with the requirements and conditions of said act, and the act amendatory thereof, approved October 14th, 1879, conveying to said lessees the said Macon and Brunswick railroad, together with the rights, privileges and franchises of the State in and to the same.

By the governor.

ALFRED H. COLQUITT, *Governor.*

J. W. WARREN, *S. E. D.*

177 EXHIBIT F.

Deed from State of Georgia to Macon and Brunswick Railroad.

This indenture, made and entered into on this 28th day of February, in the year 1880, between the State of Georgia, acting by and through Alfred H. Colquitt, its governor, party of the first part, and the Macon and Brunswick Railroad Company, a corporation created under and in pursuance of the laws of the State of Georgia, on or about the — day of February, 1880, party of the second part.

Whereas, under and by virtue of an act entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes," passed December 3rd, 1866; the party of the first part endorsed certain bonds of then existing Macon and Brunswick Railroad Company to the amount in the aggregate of one million nine hundred and fifty thousand dollars, for the amount of which bonds, and its obligation thereunder, a first lien was reserved to the party of the first part upon all of the property of the said company; and

Whereas, default having been made in the payment of the interest on said bond-, the governor of said State, under and by virtue of the provisions of said act, has taken possession of and has sold the said property, and the said State has become the purchaser thereof at such sale, and has become vested with and the owner of the Macon and Brunswick railroad, with all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character; and

178 Whereas, the bonds so endorsed by the said party of the first part, as aforesaid, except only about four thousand dollars thereof, have been fully paid by the said party of the first part; and

Whereas, the said party of the first part is willing to sell the Macon and Brunswick railroad, with all its houses, etc., upon the terms hereinafter stated; and

Whereas, the party of the first part has by a certain indenture of lease, bearing date the — day of February, 1880, *has* leased to the party of the second part the Macon and Brunswick railroad, which is the property of the said party of the first part, with all its houses, workshops, depots, rolling stock, grounds, lands and appurtenances of every character, until the 3rd day of September, 1899, under and in pursuance of the acts of the legislature of the State of Georgia, entitled "An act to authorize the lease of the Macon and Brunswick

railroad, and to confer certain chartered powers and privileges upon the lessees of said road, to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same, and to prescribe their powers and duties, and for other purposes," approved September 3rd, 1879, and another act of the legislature of the State of Georgia, entitled "An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the lessees of said road, to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida lines, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same
179 and to prescribe their powers and duties, and for other purposes," approved September 3rd, 1879, approved October 14th, 1879, as by said indenture of lease, bearing date the said — day of February, 1880, with reference thereto being had, more fully and at large *to* appear; and

Whereas, in and by said lease, as well as the acts of the legislature of the State of Georgia hereinbefore referred to, the privilege and rights and option was given to the said lessees of purchasing at any time after said lease was made, said demised premises, upon the terms stated in said acts; and

Whereas, the party of the second part has signified its intention of exercising its privilege and right and option of purchasing and has purchased the said demised premises, in accordance with the terms and provisions of said acts, and has paid to the party of the first part two hundred and fifty thousand dollars in the recognized bonds of the State of Georgia on account of the purchase price thereof: Now, therefore,

This indenture witnesseth: That the said party of the first part, for and in consideration of the premises, and one million one hundred and twenty-five thousand dollars to it, *and have* paid, or agreed to be paid, either in recognized bonds of the State of Georgia, or in United States registered bonds, or partly in one and partly in the other as heretofore prescribed, the governor of said State in executing these presents, on its own behalf, acting under and by virtue of the said acts of September 3d, 1879, and October 14th, 1879, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents, doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and its successors and assigns forever, all the rights,
180 privileges and franchises of the State of Georgia in and to the Macon and Brunswick railroad, its track, buildings, shops, rolling stock and all the things attaching to said Macon and Brunswick railroad, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the revi-sion and revi-sions, remainder and remainders, rents, issues and profits thereof; and, also, all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appur-

tenances. To have and to hold the above mentioned and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to it and their own proper use, benefit and behoof forever.

And the said party of the first part doth covenant, grant and agree to and with the said party of the second part, its successors and assigns, that the said party of the first part at the time of the sealing and delivery of these present is lawfully seized, in its own right *and* of a good, absolute and indefeasible estate, of inheritance in fee simple of and in all and singular the above granted, bargained and described premises, with the appurtenances, has good rights, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the said party of the second part, its successors and assigns, shall have, and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suits, trouble molestation,
181 eviction or disturbance of the said party of the first part, or its assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, judgments, taxes, assessments and encumbrances of what nature and kind soever; and, also, that the said party of the first part, and all and every other person or persons whatsoever, lawfully or equitably deriving any estate, right, title or interest of in or to the hereinbefore granted premises, by, from, under or in trust for it, or them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, its successors and assigns, make, do and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors or assigns, or it or their counsel, learned in the law, shall be reasonably devised or required.

And the said party of the first part, the above described and hereby granted, and released premises, and every part and parcel thereof with the appurtenances unto the said party of the first part, its successors and assigns, against the said party of the first part, and against all and every person or persons, whomsoever claiming, or to claim the same, shall and will warrant and by these presents forever defend. Two hundred and fifty thousand dollars, part
182 of the purchase price of the premises heretofore described, has been paid by the party of the second part, in recognized bonds of the State of Georgia, simultaneously with the execution and delivering of these presents, and the receipt thereof by said party of the first part is hereby acknowledged; the balance of such purchase

price, to wit, eight hundred and seventy-five thousand dollars, is to be paid, either in recognized bonds of the State of Georgia, or in United States registered bonds, or partly in one and partly in the other, as follows: Two hundred and fifty thousand dollars thereof, within two years after the day or the date of these presents, and the balance thereof within four years after the day of the date of these presents, with interest at 5 per cent. per annum on deferred payments; provided, the party of the first part shall retain a lien on said Macon and Brunswick railroad and its appurtenances, until the entire purchase-money is paid, and on the failure of the party of the second part to make payment as herein provided for, governor of the State of Georgia shall take possession of the road and appurtenances and run the same for twelve months, at which time it shall be his duty to sell the said railroad, for the balance of purchase-money, unless sooner paid. Said party of the second part may make payments on said purchase at any times and in amounts it may elect, provided they do not fall short of the payments hereinbefore required. In the event of the failure of the party of the second part to carry out its agreement with the State as hereinbefore prescribed, all payments made to the party of the first part are to be forfeited by the party of the second part, and the gov-
183 ernor of the State of Georgia shall take possession of said Macon and Brunswick railroad in the name of the State, as provided in the said act, approved September 3rd, 1879.

In witness whereof, the party of the first part hath hereunto set its great seal, and caused these presents to be signed by Alfred H. Colquitt, its governor, and countersigned by N. C. Barnett, its secretary of state; and the party of the second part hath hereunto set its corporate seal, and caused these presents to be signed by its president, and attested by its secretary, the day and year above written.

Sealed and delivered in the presence of—

(The word "twenty" in the twenty-ninth line on third page being partly written over erasure before execution.) Provided that nothing herein contained shall convey any lots of land on or near the line of any railroad in the counties of Pulaski, Dodge and Wayne, now owned by the State, except such portion thereof as may be necessary for right of way, houses, depots or other grounds necessary for the operation of said railroad.

N. C. BARNETT,
Secretary of State.
I. W. AVERY.
JNO. RHEA,
N. P., ex Officio J. P.

[Seal of State.]

ALFRED H. COLQUITT,
Governor of Georgia.
W. M. JOHNSON,
Pres't Macon and Brunswick R. R. Co.
GEO. H. HAZLEHURST,
Sec'y Macon and Brunswick R. R. Co.

[R. R. Seal.]

184 EXHIBIT G.

This indenture, made the fourteenth day of June, in the year one thousand eight hundred and eighty-one, between the Macon and Brunswick Railroad Company, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Georgia, of the first part and the East Tennessee, Virginia and Georgia Railroad Company, a corporation created, organized, and existing under the laws of the State of Tennessee, of the second part, witnesseth that the said party of the first part, for and in consideration of four hundred and twenty-five thousand dollars lawful money of the United States, and other good and valuable considerations it thereunto moving the receipt whereof by said party of the first part at or before the unsealing and delivery of these presents is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien remise, release, convey, and confirm, unto the said party of the second part, extending from Macon, in the county of Bibb, in the State of Georgia, to Brunswick, in the county of Glynn in the State of Georgia, a distance of 188
185 miles, or thereabouts, and extending from Cochran in the county of Pulaski, in said State of Georgia to Hawkinsville in the said county of Pulaski, in the said State a distance of twelve miles or thereabouts together with the power and authority of the — first part to survey, to lay out, construct, equip, use and enjoy other railroad lines, together with the tracks of said railroad or roadway, and the superstructure and rails laid thereon, and all the appurtenances thereof, and all the sidings, turnouts, bridges, viaducts, culverts, ways and rights of way, and lands and premises whatsoever, with the improvements thereon, and all erections, fences, walls, and fixtures belonging or appertaining to, or provided or used, or intended to be used, for the purposes of or in connection with the said railroad, and all the depots and stations and depot grounds belonging or appertaining to said railroad and all lands and real estate provided, held, used, or designed to be used, for such depot grounds, and all the building and repair shops, car-houses, engine-houses, and other buildings and structures whatsoever belonging or appertaining to or used, or designed to be used, for — in connection with said railroad, and also all the rolling stock of said railroad, and all locomotives, passenger cars, freight cars and all other cars, carriages, tools, machinery,
186 fuel, rails, and materials, and things of whatsoever kind, belonging or appertaining to, or used, procured or designed for the purposes of said railroad, or the completion, maintenance or operation thereof, and also all lands and real estate, situated in the State of Georgia, of any and every description whatsoever, belonging to the said party of the first part, and all buildings and improvements of any and every kind thereon, and also all and singular the franchises, easements, rights, privileges, interests, immunities, income, grants, tolls, profits, benefits, and advantages be-

longing or appertaining to, or connected with, or to arise or accrue from the said railroad above described, with its appurtenances and the maintenance and operation thereof, and all property both real and personal, of every kind and description of the said railroad company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder, and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interests, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in and to the above-described premises, and every part
187 and parcel thereof, with the appurtenances.

To have, and to hold all, and singular the above-mentioned and described premises, together with the appurtenances unto the said party of the second part its successors and assigns forever.

The premises above mentioned and described are conveyed by the said party of the said first part subject to the lien retained by the State of Georgia, upon the Macon and Brunswick railroad and its appurtenances, until the payment of the entire purchase-money, amounting to one million one hundred and twenty-five thousand dollars and interest, at and for which the same was purchased by the said party of the first part from the said State of Georgia under an act of the legislature of the State of Georgia, entitled "An act to authorize the lease or sale of the Macon and Brunswick railroad and to confer certain chartered powers and privileges upon the lessees of said road, and to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same and prescribe their powers and duties
188 and for other purposes, approved September 3, 1879, and an act of the legislature of the State of Georgia, altering and amending the act above mentioned, approved October 14, 1879; the sum of two hundred and fifty thousand dollars on account of the said purchase-money of the said Macon and Brunswick railroad, and its appurtenances, having been paid to said State of Georgia by the party of the first part, on or about the 28th day of February, 1880, and no further payments on account of such purchase having been heretofore made, and subject to the rights reserved in favor of the said State of Georgia, or its governor, on failure to make due payment of such balance of said purchase-money, as provided in the said acts, and subject to the duties and obligations by said acts imposed and prescribed, and the said party of the second part hereby assumes the payment of such balance of such purchase price and the fulfillment of all the other obligations arising or existing under the laws of the State of Georgia, or the contract for the purchase of such railroad from the State of Georgia, in respect to the extension of such railroad or otherwise howsoever.

189 In witness whereof, the said party of the first part hath caused its corporate seal to be hereunto affixed, and these

presents to be signed by its president, and attested by its secretary the day and year first above written.

MACON AND BRUNSWICK RAILROAD COMPANY,
By WM. JOHNSTON, *Pres't.* [SEAL.]
C. H. BOSCHER,
Secretary Macon and Brunswick R. R. Co.

Signed, sealed, and delivered in the presence of—
WILLIAM H. CLARKSON.
E. S. GOLBORNE.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 14th day of June, A. D. 1881, before me, William H. Clarkson, a commissioner of the State of Georgia in New York, residing in the city of New York, personally appeared William M. Johnston, the president of the Macon and Brunswick Railroad Company aforesaid, and Charles H. Bosher, the secretary of the same company, to me personally known to be the individuals named in and who executed the foregoing instrument as the president and secretary of said company, who
190 acknowledged that they executed the same for uses and purposes therein named and mentioned as their act and deed as the president and secretary of said company and the act and deed of said company; and the said William M. Johnston and Charles H. Boshen being by me first duly sworn, they did depose and say that he, the said William M. Johnston, was president of the said Macon and Brunswick Railroad Company; that he, the said Charles H. Bosher, was the secretary of the said company; that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and secretary of said company respectively.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of June, A. D. 1881.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner for the State of Georgia in New York,
115 *Broadway, N. Y. City.*

191 EXHIBIT H.

STATE OF TENNESSEE, }
County of Knox. }

This indenture, made and entered into this thirtieth day of September in the year one thousand eight hundred and eighty-one, by and between the East Tennessee, Virginia, and Georgia Railroad Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee, acting in this behalf, by and through its president and secretary after

a vote of its directors, duly passed in pursuance of its charter and by-laws, as a party of the first part, and the Macon and Brunswick Railroad Company, a corporation duly incorporated, organized and existing under the laws of Georgia, as party of the second part.

Witnesseth, that said party of the first part, for and in consideration of the sum of four hundred and twenty-five thousand dollars, lawful money of the United States, and other good and valuable consideration it thereunto moving, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell,
192 alien, remise, release, convey and confirm, unto the said party of the second part, its successors and assigns, all and singular the railroad extending from Macon, in the county of Bibb, in the State of Georgia, to Brunswick, in the county of Glynn, in the State of Georgia, a distance of one hundred and eighty-eight miles, or thereabouts, and extending from Cochran, in the county of Pulaski, in said State of Georgia, to Hawkinsville, in the said county of Pulaski, in the said State, a distance of twelve miles or thereabouts, together with the power and authority to survey, lay out, construct, equip, use and enjoy a railroad from the said city of Macon to the city of Atlanta, in the county of Fulton, in the said State of Georgia, and to survey, lay out, construct, equip, use and enjoy other railroad lines, together with the tracks of said railroad, or roadway, and the superstructure and rails laid thereon, and all the appurtenances thereof, and all the sidings, turnouts, bridges, viaducts, culverts, ways, and rights of way, and lands and premises whatsoever, with the improvements thereon, and all erections, fences, walls, and fixtures belonging or appertaining to, or
193 provided or used, or intended to be used, for the purposes of or in connection with the said railroad, and all the depots and stations, and depot grounds, belonging or appertaining to said railroad, and all lands and real estate provided, held, used, or designed to be used, for such depot grounds, and all the buildings and repair shops, car-houses, engine-houses, and other buildings and structures whatsoever, belonging to or appertaining to or used, or designed to be used, for or in connection with said railroad, and also all the rolling stock of said railroad, and all locomotives, passenger cars, freight cars and all other cars, carriages, tools, machinery, fuel, rails and materials, and things of whatsoever kind, belonging or appertaining to, or used, procured or designed for the purposes of said railroad, or the completion, maintenance or operation thereof, and also lands and real estate situated in the State of Georgia, of any and every description whatsoever, as described in a deed to it, and all buildings and improvements of any and every kind thereon, and also all and singular the franchises, easements, rights, privileges, interests, immunities, income, grants, rolls, profits, benefits and advan-
194 tages belonging or appertaining to, or connected with, or to arise or accrue from the said railroad above described, with its appurtenances, and the maintenance and operation thereof, and all property, both real and personal, of every kind and description,

of the said railroad company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, titles, interest, property, possession, claim and demand whatsoever as well in law as in equity, of the said party of the first part of, in and to the above-described premises, and every part and parcel thereof, with the appurtenances, said property being the same described in said deed to it.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns, forever.

The premises above mentioned and described are conveyed by the said party of the first part, subject to the lien retained
195 by the said State of Georgia upon the Macon and Brunswick railroad and its appurtenances, until the payment of the entire purchase-money, amounting to one million, one hundred and twenty-five thousand dollars, and interest, at and for which the same was purchased by said party of the second part from the said State of Georgia under an act of the legislature of the State of Georgia entitled "An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the lessees of said road, and to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus, and to appoint commissioners to run the same, and prescribe their powers and duties, and for other purposes," approved September 3, 1879, and an act of the legislature of the State of Georgia, altering and amending the act above mentioned, approved October 14, 1879, the sum of two hundred and fifty thousand dollars, on account of the said purchase-money of the said Macon and Brunswick railroad
196 and its appurtenances, having been paid to said State of Georgia by the party of second part, on or about the 28th day of February, 1880, and no further payments on account of such purchase having been heretofore made, and subject to the rights reserved in favor of the said State of Georgia, or its governor, on failure to make due payment of such balance of said purchase-money, as provided in the said acts, and subject to the duties and obligations by said acts imposed and prescribed, and the said party of the second part hereby assumes the payment of such balance of such purchase price and the fulfillment of all other obligations arising or existing under the laws of the State of Georgia or the contract for the purchase of such railroad from the State of Georgia, in respect to the extension of such railroad or otherwise howsoever.

In witness whereof, the said party of the first part hath caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and by its secretary, the day and year
197 first above written.

—— ——, *President.* [SEAL.]
—— ——, *Secretary.*

198 Office clerk superior court, Glynn county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Glynn County, Georgia.

Office clerk superior court, Wayne county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Wayne County, Georgia.

Office clerk superior court, Appling county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Appling County, Georgia.

199 Office clerk superior court, Coffee county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Coffee County, Georgia.

Office clerk superior court, Telfair county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Telfair County, Georgia.

Office clerk superior court, Dodge county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Dodge County, Georgia.

200 Office clerk superior court, Pulaski county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Pulaski County, Georgia.

Office clerk superior court, Twiggs county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Twiggs County, Georgia.

Office clerk superior court, Bibb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Bibb County, Georgia.

201 Office clerk superior court, Monroe county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Monroe County, Georgia.

Office clerk superior court, Butts county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Butts County, Georgia.

Office clerk superior court, Henry county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Henry County, Georgia.

202 Office clerk superior court, De Kalb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, De Kalb County, Georgia.

Office clerk superior court, Fulton county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Fulton County, Georgia.

203 EXHIBIT I.

STATE OF GEORGIA, }
Fulton County. }

Whereas, at the session of the legislature of Georgia, begun in the month of July, in the year eighteen hundred and eighty-one, Samuel Thomas and others, comprising all the stockholders of the Macon and Brunswick Railroad Company, applied for the passage of a bill to be entitled "An act to incorporate the Cincinnati and Georgia Railroad Company," and to define its rights, powers, and privileges, and for other purposes, in which said bill E. W. Cole, Samuel Thomas, George I. Seney, C. S. Brice, and Nelson Robinson, who were then and who are now the directors of the Macon and Brunswick railroad, were named as corporators;

And whereas, said bill passed and became a law, and by virtue thereof said E. W. Cole, Samuel Thomas, George I. Seney, C. S. Brice, and Nelson Robinson, who are now the directors of said Macon and Brunswick railroad, and their associates, successors, and assigns, thereby became incorporated and made a body corporate and politic, under the name and style of the Cincinnati and
204 Georgia Railroad Company;

And whereas, said Cincinnati and Georgia Railroad Company has been duly organized, as provided by said charter;

And whereas, by the terms of said law so passed said Cincinnati and Georgia Railroad Company were authorized to purchase the Macon and Brunswick railroad, and to acquire, hold, and enjoy all and singular of its rights, franchises, powers, privileges, and immunities, all of which said Macon and Brunswick Railroad Company were authorized to sell and convey to it, as therein provided;

And whereas, said corporators and their associates have subscribed for the stock of said Cincinnati and Georgia Railroad Company, and said corporators named, by virtue of the authority of said law, have agreed to receive said Macon and Brunswick railroad, and all of its property, rights, privileges, immunities, and franchises of every kind whatsoever, in full payment for their said subscription:

Now, therefore, this indenture, made and entered into this fourth day of November, in the year eighteen hundred and eighty-
205 one, by and between the Macon and Brunswick Railroad Company, a corporation duly chartered, created, organized and existing under and by virtue of the laws of the State of Georgia, as a party of the first part, and the Cincinnati and Georgia Railroad Company, a corporation also duly chartered, created, organized, and existing under and by virtue of the laws of the State of Georgia, as aforesaid, as a party of the second part—

Witnesseth, that said party of the first part, after being hereunto authorized by the unanimous vote of all its directors and stockholders, at meetings duly called and held, for and in consideration of ten dollars and the said sums so subscribed of the fully paid stock of said party of the second part, to said Thomas and asso-

ciates, aforesaid stockholders of said party of the first part, in hand paid and delivered at and before the selling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, and confirm unto said party of the second part, its successors
206 and assigns all and singular the railroad of the said party of the first part extending, and now being operated from Macon in the county of Bibb, in the State of Georgia, to Brunswick in the county of Glynn, in the State of Georgia, a distance of one hundred and eighty-eight (188) miles, or thereabouts, and extending from Cochran in the county of Pulaski, in the said State to Hawkinsville, in said county and State, a distance of twelve (12) miles, or thereabouts, together with the power and authority of the party of the first part, and all contracts and agreements made in pursuance thereof for surveying, laying out, constructing, equipping, using and enjoying a railroad from the said city of Macon to the city of Atlanta, in the county of Fulton, in the said State of Georgia, and to survey, lay out, construct, equip, use, and enjoy such other railroad lines or branches thereof as the charter of said party of the first part will permit, together with the tracks of said railroad and roadway, and the superstructure and rails laid thereon, and all the appurtenances thereof, and all the sidings, turnouts, bridges, viaducts, culverts, ways, and rights of way and lands and premises whatsoever, with the improvements thereon, and all erections, fences, walls, and fixtures belonging or appertaining
207 thereto, or provided or used or intended to be used for the purposes of or in connection with the said railroad and all the depots and stations and depot grounds, belonging or appurtaining to said railroad, and all lands and real estate provided, held, used or designed to be used for such depot grounds, and all the building and repair shops, car-houses, engine-houses and other buildings and structures whatsoever belonging or appertaining to or used, or designed to be used, for or in connection with said railroad, and also all the rolling stock of said railroad, and all locomotives, passenger cars, freight cars, and all other cars, carriages, tools, machinery, fuel, rails, and materials and things of whatsoever kind belonging or appertaining to, or used, procured or designed for the purpose of said railroad or any of its branches or extensions, or the completion, maintenance or operation thereof, and also all lands and real estate situated in the State of *of* Georgia, of any and every description whatsoever, belonging to said party of the first part, and all buildings and improvements of any and every kind thereon, and also all and singular the franchises, easements, rights, priviliges, interests, immunities, income, grants, tolls, profits, benefits, and
208 advantages belonging to or in anywise appertaining to or connected with or to arise, or accrue from the said railroad above described and any of its branches or extensions with its or their appurtenances, and the maintenance and operation thereof, and all property, both real and personal, of every kind and description of the said railroad company, together with all and singular

the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of in and to the above-described premises and every part and parcel thereof with the appurtenances. It is the intention and meaning of the parties hereto that the above description shall be complete and exhaustive, and that it shall cover and embrace all the franchises, powers, privileges, immunities, rights, property, contracts, benefits, of every kind and character whatsoever, to which said party of the first part is now entitled or possessed, or to which it may in any way become entitled to have, own, use or enjoy.

209 To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

The property above mentioned and described is conveyed by the said party of the first part, subject to the lien retained by the State of Georgia upon Macon and Brunswick railroad and its appurtenances, until the entire purchase-money is paid, amounting to one million one hundred and twenty-five thousand dollars and interest, at and for which the same was purchased by the said party of the first part from the said State of Georgia, under an act of the legislature of the State of Georgia, entitled "An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the lessees of said road; and to build extensions of the same from Macon to Atlanta, from Brunswick to the Florida line, and from Hawkinsville or Eastman to Americus; and to appoint commissioners to run the same, and prescribe their powers and duties; and for other purposes," approved September 3, 1879; and an act of the legislature of the State of Georgia, altering and amending the act above mentioned

210 approved October 14, 1879; the sum of two hundred and fifty thousand dollars on account of said purchase-money of the said Macon and Brunswick railroad and its appurtenances having been paid to said State of Georgia by the Brunswick railroad on or about the twenty-eight- (28th) day of February, eighteen hundred and eight-, (1880) and no further payments on account of such purchase having been heretofore made, and subject to the rights reserved in favor of said State of Georgia, or its governor, on failure to make due payment of such balance of said purchase-money as provided in the said acts, and subject to the duties, and obligations by said acts imposed and prescribed, and subject also to all contracts, debts, and liens, other than that above named which are upon said property, or for which said party of the first part is liable or bound. And said party of the second part hereby assumes the payment of such purchase price, and the fulfillment of all the other obligations arising or existing under the laws of the State of Georgia, or the contract for the purchase of such railroad

211 from the State of Georgia *or the contract for the purchase of*

such railroad from the State of Georgia in respect to the extension of such railroad, or otherwise howsoever, and also all other contracts, debts, or liens other than that named upon said property, or for which said party of the first part is liable or bound.

In witness whereof, the said party of the first part hath caused its corporate seal to be hereunto affixed, and these presents to be signed by its president, and by its secretary, the day, and year first above written.

——— ———, *President.* [L. S.]
——— ———, *Secretary.* [L. S.]

Signed, sealed, and delivered in presence of—
——— ———.

212 Office clerk superior court, Glynn county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

——— ———,
Clerk Superior Court, Glynn County, Georgia.

Office clerk superior court, Wayne county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

——— ———,
Clerk Superior Court, Wayne County, Georgia.

Office clerk superior court, Appling county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

——— ———,
Clerk Superior Court, Appling County, Georgia.

213 Office clerk superior court, Coffee county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

——— ———,
Clerk Superior Court, Coffee County, Georgia.

Office clerk superior court, Telfair county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

——— ———,
Clerk Superior Court, Telfair County, Georgia.

Office clerk superior court, Dodge county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Dodge County, Georgia.

214 Office clerk superior court, Pulaski county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Pulaski County, Georgia.

Office clerk superior court, Twiggs county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Twiggs County, Georgia.

Office clerk superior court, Bibb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Bibb County, Georgia.

215 Office clerk superior court, Monroe county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Monroe County, Georgia.

Office clerk superior court, Butts county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Butts County, Georgia.

Office clerk superior court, Henry county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Henry County, Georgia.

216 Office clerk superior court, De Kalb county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

———— ————,
Clerk Superior Court, De Kalb County, Georgia.

Office clerk superior court, Fulton county, Georgia.

——— —, 1882.

Filed in my office for record ——— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

———— ————,
Clerk Superior Court, Fulton County, Georgia.

217 "EXHIBIT K."

STATE OF GEORGIA, }
Fulton County. }

This indenture, made and entered into this thirtieth day of December, 1881, by and between the Cincinnati and Georgia Railroad Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Georgia, acting in this behalf by and through its president and secretary, under and by virtue of the authority granted to them by the resolutions of its board of directors, and passed in pursuance of its charter, at a meeting duly called and held, as a party of the first part, and the East Tennessee, Virginia and Georgia Railroad Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee, acting in this behalf after the vote of its directors had at a meeting duly called and held, which said action was duly ratified and confirmed at a meeting of its stockholders, duly called and held.

Witnesseth, that said party of the first part, for and in considerat-
of the sum of ten dollars, to it in hand paid, and also other good
and valuable considerations, it hereunto moving, and of the
218 contracts between the Macon and Brunswick Railroad Company, the Cincinnati and Georgia Railroad Company, the East Tennessee, Virginia and Georgia Railroad Company, and Thomas & Co., dated November 1, 1881, which are found in the record of deeds and contracts of the party of the first part, the receipt of all of which said considerations is hereby acknowledged, said party of the first part hereby grants, bargains, sells, and conveys unto said party of the second part, its successors, and assigns, all and singular that railroad of the party of the first part, extending and now being operated from Macon, in the county of Bibb, in the State of Georgia, to Brunswick, in the county of Glynn, in the State of Georgia, a distance of one hundred and eighty-eight (188) miles, or thereabouts, and extending from Cochran, in the county

of Pulaski, in the said State, to Hawkinsville, in said county and State, a distance of twelve (12) miles, or thereabouts, and also the railroad now being constructed from said city of Macon to Atlanta, in the county of Fulton, and also that railroad now being constructed from said city of Atlanta to the city of Rome, in the county of Floyd, and State of Georgia, under the authority given by law,
and also all contracts, and agreements, made in pursuance
219 thereof for surveying, laying out, constructing, equipping,
using, and enjoying a railroad from the said city of Macon to the city of Atlanta, in the county of Fulton, in the said State of Georgia, and from the city of Atlanta aforesaid, to the city of Rome, aforesaid, and to survey, lay out, construct, equip, use and enjoy such other railroad lines or branches thereof as the charter of said party of the first part will permit, together with the tracks of said railroads and roadways, and the superstructure and rails thereon, and all the appurtenances thereof and all the sidings, turnouts, bridges, viaducts, culverts, ways, and rights of way, and lands and premises whatsoever, with the improvements thereon, and all erections, fences, walls, and fixtures belonging or appertaining thereto, or provided or used, or intended to be used, for the purposes of or in connection with the said railroads, and all the depots and stations and depot grounds belonging or appertaining to said railroads, and all the depots and stations and depot grounds belonging or appertaining to said railroads and all lands and real estate provided, held,
used, or designed to be used for such depot grounds, and
220 all the building and repair shops, car-houses, engine-houses
and other buildings and structures whatsoever belonging or appertaining to or used, or designed to be used, for or in connection with said railroads, and also all the rolling stock of said railroads and all locomotives, passenger cars, freight cars and all other cars, carriages, tools, machinery, fuel, rails, and materials and things of whatsoever kind belonging or appertaining to, or used, procured, or designed for the purpose of said railroads, or any of their branches or extensions, or the completion, maintenance or operation thereof, and also all lands and real estate situated in the State of Georgia, of any and every description whatsoever belonging to said party of the first part, and all buildings and improvements of any and every kind thereon, and also all and singular the franchises, easements, rights, privileges, interests, immunities, income, grants, tolls, profits, benefits and advantages belonging to or in anywise appertaining to or connected with or to arise or accrue from the said railroads above
described and any of their branches or extensions, with its
221 or their appurtenances, and the maintenance, and operation
thereof, and all property both real, and personal, of every kind and description of the said railroad company, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder, and remainders, rents, issues, and profits thereof and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the above-described

premises, and every part and parcel thereof, with the appurtenances.

It is the intention and meaning of the parties hereto that the above descriptions shall be complete and exhaustive, and that it shall cover and embrace all the franchises, powers, privileges, immunities, rights, property, contracts, benefits of every kind and character whatsoever, to which said party of the first part is now entitled or possessed, or to which it may in every way become entitled to have, own, use, or enjoy.

To have and to hold all, and singular the above men-
222 tioned and described premises together with the appurtenances, unto the said party of the second part, its successors, and assigns forever. The property above mentioned and described is conveyed by the said party of the first part subject to the lien, retained by the State of Georgia upon the Macon and Brunswick railroad and its appurtenances, and until the entire purchase-money is paid, amounting to one million one hundred and twenty-five thousand dollars and interest, at and for which the same was purchased by the said party of the first part from the said State of Georgia, under an act of the legislature of the State of Georgia entitled "An act to authorize the lease or sale of the Macon and Brunswick railroad, and to confer certain chartered powers and privileges upon the lessees of said road, and to build extensions of the same from Macon to Atlanta, from Brunswick to Florida line, and from Hawkinsville or Eastman to Americus; and to appoint commissioners to run the same, and prescribe their powers, and duties, and for *which* other purposes," approved September 3, 1879; and
223 an act of the legislature of the State of Georgia, altering and amending the act above mentioned, approved October 14, 1879; the sum of two hundred and fifty thousand dollars on account of said purchase-money of the said Macon and Brunswick railroad and its appurtenances having been paid to said State of Georgia by the party of the first part, on or about the twenty-eighth (28th) day of February, eighteen hundred and eighty (1880), and no further payment on account of such purchase having been heretofore made, and subject to the rights reserved in favor of said State of Georgia, or its governor, or failure to make due payment of such balance of said purchase-money as provided in the said acts, and subject to the duties and obligations by said acts imposed and prescribed, and subject also to all contracts, debts, and liens other than that above named which are upon said property, or for which said party of the first part is liable or bound. And said party of the second part hereby assumes the payment of such balance of such purchase price, and the fulfillment of all other obligations arising or existing under the laws of the State of Georgia on the con-
224 tract *contract* for the purchase of such railroad from the State of Georgia in respect to the extension of such railroad, or otherwise howsoever, and also all other contracts, debts, or liens other than that named upon said property, or for which said party of the first part is liable or bound.

In witness whereof, the said party of the first part hath caused

its corporate seal to be hereunto affixed, and these presents to be signed by its president and by its secretary, the day and year first above written.

—— ——, *President.* [L. S.]
—— ——, *Secretary.* [L. S.]

Signed, sealed, and delivered in presence of—
—— ——.

225 Office clerk superior court, Glynn county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded in Book —, pages —, of deeds of said county.

—— ——,
Clerk Superior Court, Glynn County, Georgia.

Office clerk superior court, Wayne county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,
Clerk Superior Court, Wayne County, Georgia.

Office clerk superior court, Appling county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, *and recorded same day in Book —, pages —,* of deeds of said county.

—— ——,
Clerk Superior Court, Appling County, Georgia.

226 Office clerk superior court, Coffee county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,
Clerk Superior Court, Coffee County, Georgia.

Office clerk superior court, Telfair county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,
Clerk Superior Court, Telfair County, Georgia.

Office clerk superior court, Dodge county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Dodge County Georgia.

227 Office clerk superior court, Pulaski county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Pulaski County, Georgia.

Office clerk superior court, Twiggs county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Twiggs County, Georgia.

Office clerk superior court, Bibb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Bibb County, Georgia.

228 Office clerk superior court, Monroe county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Monroe County, Georgia.

Office clerk superior court, Butts county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Butts County, Georgia.

Office clerk superior court, Henry county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Henry County, Georgia.

229 Office clerk superior court, De Kalb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, De Kalb County, Georgia.

Office clerk superior court, Fulton county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Fulton County, Georgia.

Office clerk superior court, Cobb county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Cobb County, Georgia.

230 Office clerk superior court, Campbell county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Campbell County, Georgia.

Office clerk superior court, Douglass county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Douglass County, Georgia.

Office clerk superior court, Paulding county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Paulding County, Georgia.

231 Office clerk superior court, Polk county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882; recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Polk County, Georgia.

Office clerk superior court, Bartow county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Bartow County, Georgia.

Office clerk superior court, Floyd county, Georgia.

—— —, 1882.

Filed in my office for record —— —, 1882, and recorded same day in Book —, pages —, of deeds of said county.

—— ——,

Clerk Superior Court, Floyd County, Georgia.

232 EXHIBIT "L."

Organization and Incorporation of the East Tennessee, Virginia and Georgia Railway Co., Knoxville, Tenn., July, 1886.

Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee at the Federal court-room, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 11th day, of January, A. D. 1886—present and presiding, the Honorable D. M. Key, judge, &c.—the following proceedings were had, to wit:

THURSDAY MORNING, *March 18th*, 1886.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge, &c.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant, *against* THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and Others, Defendants. } In Equity. No. 787.

233 *Decree of Foreclosure and Sale.*

And now this day the above-entitled cause came on to be further heard upon the original bill of complaint herein, filed on the 7th day of January, 1885, heretofore taken as confessed as to said defendant, The East Tennessee, Virginia and Georgia Railroad Company, and upon the amended and supplemental — of complaint herein filed on the 17th day of March, 1886, and upon the appearance of the several defendants, The East Tennessee, Virginia and Georgia Railroad Company, The Tennessee State Line Railroad Company, and Samuel Thomas, by their respective solicitors, who have waived issue and service of process and have consented to the

making and entry of this decree and upon all the orders and decrees heretofore entered in this cause; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely:

I. The court finds that the material allegations contained in said bill of complaint and in said amended and supplemental bill of complaint are true; that on or about the 15th day of June, 1881, the defendant The East Tennessee, Virginia and Georgia Rail-
234 road Company made, executed, and delivered to the complainant, The Central Trust Company of New York, as trustee, a certain deed of trust and mortgage bearing date on said last-mentioned day, whereby it granted, bargained, sold, transferred, and conveyed to said Central Trust Company of New York, as trustee, and to its successors and assigns forever, the property therein and hereinafter more particularly described, in trust to secure the payment of the principal and interest of a certain series of bonds then about to be issued by said railroad company to the amount of $22,000,000 of principal, and that said mortgage (known and hereinafter designated as the consolidated first mortgage) was duly recorded in the several counties in the States of Tennessee, Georgia, Alabama, and Mississippi, respectively, wherein the said mortgaged property was situated.

II. The court further finds that thereafter and prior to the filing of the bill in this suit the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, made and executed its twenty-two thousand bonds of the issue aforesaid each for the sum of one thousand dollars, bearing date the first day of July, 1880,
235 all in the form described in said consolidated first mortgage, and by the terms of each of said bonds said railroad company promised to pay to the bearer or registered owner thereof the sum of one thousand dollars in United States gold coin on July 1, 1930, with interest thereon from July 1, 1880, at five per cent. per annum, payable in like gold coin on the first days of January and July in each year. The said defendant, The East Tennessee, Virginia and Georgia Railroad Company, did, at divers times prior to the filing of the bill in this suit, issue, deliver, and sell or cause to be issued, delivered, and sold fourteen thousand six hundred and seventy-four of the said twenty-two thousand bonds, with coupons attached, all of which said last-mentioned bonds were, prior to the delivery thereof, duly authenticated by the certificate of said complainant as trustee in manner and form as prescribed in and by said deed of trust and mortgage. The court finds that the remaining seven thousand three hundred and twenty-six bonds were not issued or caused to be issued or sold by said railroad company.

III. The court further finds that the said defendant, The
236 East Tennessee, Virginia and Georgia Railroad Company, made default in the payment of the installment of interest which became due and payable on the 1st day of January, 1885, upon the said bonds secured by said consolidated first mortgage; that said default continued for more than three months; that under

and by virtue of the terms and provisions of said consolidated first mortgage the holders of the one-half part of the bonds outstanding thereunder had the right to declare the principal of said bonds due and payable after such default had so continued for three months; that the holders of the one-half part and of more than the one-half part of all the bonds outstanding under said mortgage did, after the said default had continued three months, duly declare the principal of said bonds due and payable in accordance with the provisions of said mortgage; that said defendant also made default in the payment of the several installments of interest on said bonds which became due and payable respectively on the 1st day of July, 1885, and on the 1st day of January, 1886.

That the whole principal of said bonds, to wit, fourteen
237 million and seventy-four thousand dollars, has become and is due and payable from said defendant, The East Tennessee, Virginia and Georgia Railroad Company, in accordance with the provisions of said mortgage, and that there is also in arrear and due from said defendant as interest on the said bonds the sum of one million one hundred thousand five hundred and fifty dollars in gold coin of the United States, with interest at six per cent. p'r annum on $366,850, part thereof, from January 1st, 1885; on $366,850, part thereof, from July 1st, 1885, and on $366,850, remainder thereof, from January 1st, 1886.

IV. The court further finds that the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, has failed and omitted to keep and perform the stipulations of the said bonds and the covenants contained in the said deed of trust or mortgage, and that the said conveyance therein contained has become absolute; that prior to the time of filing the amended and supplemental bill in this suit and after said default had continued for more than three months the complainant was duly requested in writing by the holders of more than one-fourth part of said bonds then out-
238 standing, in respect to which or the coupons upon which such default had been made, to foreclose said mortgage and to enforce the lien thereof.

V. The court further finds that on or about the 15th day of June, 1881, the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, made, executed, and delivered to the complainant, as trustee, a certain other deed of trust and mortgage, known as its income mortgage, bearing date on that day, whereby it conveyed to the said trustee all the property embraced and described in said consolidated first mortgage, subject, however, to said consolidated first mortgage in order to secure the payment of a series of bonds known as "income bonds" for the sum of $1,000 each, with interest at six per cent. per annum, to be paid only out of the net earnings of the said defendant company, which said last-mentioned mortgage was duly recorded in each of the several counties in which said consolidated first mortgage was recorded so as to constitute a lien upon the railroad and property thereby conveyed subordinate to the lien of said consolidated first mortgage; that said income

bonds to the number of 16,500 and to the aggregate amount
239 of $16,500,000 of principal were duly authenticated by said trustee and issued by said East Tennessee, Virginia and Georgia Railroad Company, and that the lien thereof is in all respects subordinate and inferior to the lien of said consolidated first mortgage upon the property and premises therein mentioned and described.

VI. The court further finds that in and by said consolidated first mortgage the defendant the East Tennessee, Virginia and Georgia Railroad Company agreed to and did waive, in the event that the property mentioned therein and conveyed was decreed to be sold under the judgment or decree of any competent court in a suit for the foreclosure of said mortgage, any benefit or advantage of any and all valuation, stay, appraisement, extension, or redemption law or laws of the States of Tennessee, Georgia, Alabama, and Mississippi, otherwise applicable to such a sale, and also any and all right of redemption which it might otherwise be entitled to under any such laws, whether then existing or thereafter enacted.

VII. And the court further finds that in and by said consolidated first mortgage it was, among other things, stated and set forth
240 that the said East Tennessee, Virginia and Georgia Railroad Company had theretofore purchased the railroad which formerly belonged to the Knoxville and Ohio Railroad Company, and that at the time of the execution and delivery of said consolidated first mortgage it owned the line of railroad of said Knoxville and Ohio Railroad Company, extending from Knoxville, in the State of Tennessee, to a point on the southern boundary line of the State of Kentucky at or near the point where the Elk fork of the Cumberland river crosses the State line between the States of Kentucky and Tennessee, and the said last-mentioned line of railway, sixty-six miles, more or less, was included within the terms of the description of the property and premises covered by and subject to the lien of said consolidated first mortgage and income mortgage; that prior to the time of filing the original bill in this suit a certain suit or proceeding in equity was prosecuted in this court, wherein the Mayor and Aldermen of Knoxville were complainants and Knoxville and Ohio Railroad Company, The East Tennessee, Virginia and Georgia Railroad Company, and The Central Trust Company of New York were defendants, in which suit in equity such proceedings were had that by a decree of this court it was, among other things, found, adjudged,
241 and determined that the conveyance of the said last-mentioned line of *last-mentioned line of* railroad by said Knoxville and Ohio Railroad Company to the East Tennessee, Virginia and Georgia Railroad Company was invalid and void, and that the said consolidated first mortgage and said income mortgage, in so far as they purported to be conveyances in trust of the property of said Knoxville and Ohio Railroad Company, were clouds upon the title of said Knoxville and Ohio Railroad Company and should be removed therefrom.

That in said last-mentioned suit it was further adjudged and determined that on the 1st day of October, 1884, there *was* due from the

Knoxville and Ohio Railroad Company to the East Tennessee, Virginia and Georgia Railroad Company divers sums amounting in the aggregate to the sum of $1,808,745.72, with interest, and that in pursuance of an agreement of the parties, ratified and approved by this court, the said indebtedness should be paid and discharged by the delivery by said Knoxville and Ohio Railroad Company to the East Tennessee, Virginia and Georgia Railroad Company of two million four hundred thousand dollars par value of the capital stock of the Memphis and Charleston Railroad Company and two hundred thousand dollars par value of the first-mortgage
242 bonds of said East Tennessee, Virginia and Georgia Railroad Company (Cincinnati and Georgia division) of the issue hereinafter mentioned and described and by the cancellation and discharge of certain debenture bonds of the East Tennessee, Virginia and Georgia Railroad Company upon condition that said East Tennessee, Virginia and Georgia Railroad Company should deposit with the Central Trust Company of New York a sufficient number of shares of the capital stock of the Memphis and Charleston Railroad Company unincumbered, which, together with $2,400,000 par value of such Memphis and Charleston Railroad stock, should constitute a clear majority of the entire capital stock of said Memphis and Charleston Railroad Company; and it was further adjudged and decreed by this court that as said trust company, as trustee for the benefit of the holders of said bonds, was entitled to the beneficial interest in the said property so adjudged to be transferred by said Knoxville and Ohio Railroad Company to said East Tennessee, Virginia and Georgia Railroad Company in settlement and discharge of the indebtedness of said Knoxville and Ohio Railroad Company to said East Tennessee, Virginia and Georgia Railroad Company, the last-named corporation should turn over to said trust company
243 as trustee the said Memphis and Charleston Railroad Company stock and the said first-mortgage Cincinnati and Georgia Division bonds received by it in discharge of said debt, to be held by said trustee as security for the payment of the bonds secured by said consolidated first mortgage and said income mortgage, with the same priorities in respect thereto as existed under said mortgages in relation to the other property covered thereby, the legal title to said stock and bonds to be and remain in said East Tennessee, Virginia and Georgia Railroad Company until such time as by the foreclosure of said lien the title might become vested in some purchaser, or, in case of the payment of the bonds secured by said two mortgages, the entire possession and control of said stock and bonds should be vested in the said East Tennessee, Virginia and Georgia Railroad Company absolutely.

That under and in pursuance of the terms of the said judgments and decrees the said East Tennessee, Virginia & Georgia Railroad Company delivered to said trustee $2,400,000 par value of the capital stock of said Memphis and Charleston Railroad Company, together with $256,525 of said capital stock, which, taken alto-
244 gether, constitute a clear majority of the entire capital stock of said Memphis and Charleston Railroad Company, and

also the said $200,000 par value of the bonds of said East Tennessee, Virginia and Georgia Railroad Company (Cincinnati and Georgia division); and said trustee now holds said stock and bonds pursuant to said judgment and decrees as further security for the payment of the said consolidated first-mortgage bonds and said income bonds, with the same priorities in respect thereto as exists under said mortgages in relation to the other property covered thereby.

VIII. The court further finds that in and by said consolidated first mortgage it was, among other things, stated and set forth that the said East Tennessee, Virginia and Georgia Railroad Company at the time of the execution and delivery of said consolidated first mortgage owned the line of railroad extending from Ooltewah, James county, Tennessee, to Red Clay, Bradley county, Tennessee,* and the said last-mentioned line of railway was included within the terms of the description of the property and premises covered by and subject to the lien of said consolidated first mortgage,
245 but that title to said last-mentioned line of railway did not become vested in said East Tennessee, Virginia and Georgia Railroad Company until after the same had become subject to the mortgage next hereinafter mentioned and described.

IX. And the court further finds that on and prior to March 1st, 1883, the defendant The Tennessee State Line Railroad Company was indebted to the defendant The East Tennessee, Virginia and Georgia Railroad Company for moneys advanced for the construction of its railway and its appurtenances; that on or about the 1st day of March, 1883, the said East Tennessee, Virginia and Georgia Railroad Company and the said Tennessee State Line Railroad Company made, executed, and delivered to the complainant, The Central Trust Company of New York, as trustee, a certain deed of trust and mortgage (hereinafter styled the Cincinnati and Georgia Division mortgage), bearing date on said last-mentioned day, whereby they granted, bargained, sold, transferred, and conveyed to said Central Trust Company of New York, as trustee, and to its successors and assigns forever the property therein and hereinafter more particularly described in trust to secure the payment of the principal
246 and interest of a certain series of bonds then about to be issued by said East Tennessee, Virginia and Georgia Railroad Company to the amount of $2,000,000 of principal, and that said mortgage (known as the Cincinnati and Georgia Division mortgage) was duly recorded in the several counties in the States of Tennessee and Georgia, respectively, wherein the said mortgaged property was situated.

X. The court further finds that thereafter and prior to the filing of the bill in this suit the said East Tennessee, Virginia and Georgia Railroad Company made and executed its two thousand bonds of the issue last aforesaid, each for the sum of one thousand dollars, bearing date the 1st day of March, 1883, all in the form described in said Cincinnati and Georgia Division mortgage, and by the terms of each of said bonds said railroad company promised to pay to the

* Should read Whitfield county, Georgia.

bearer or registered owner thereof the sum of one thousand dollars in United States gold coin on March 1st, 1923, with interest thereon from March 1st, 1883, at six per cent. per annum, payable in like gold coin on the first days of March and September in each year; that said defendant, The East Tennessee, Virginia and Georgia Railroad Company, did, at divers times prior to the filing of the bill in this suit, issue, deliver, and sell, or cause to be
247 issued, delivered, and sold, the said two thousand bonds, with coupons attached, all of which last-mentioned bonds were, prior to the delivery thereof, duly authenticated by the certificate of said complainant as trustee in manner and form as prescribed in and by said deed of trust and mortgage.

XI. The court further finds that the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, made default in the payment of the installment of interest which became due and payable on the 1st day of March, 1885, upon the said bonds secured by said Cincinnati and Georgia Division mortgage — the holders of the one-half part of the bonds outstanding thereunder had the right to declare the principal of said bonds due and payable after such default had so continued for three months; that the holders of the one-half part and of more than the one-half part of all the bonds outstanding under said mortgage did, after said default had continued three months, duly declare the principal of said bonds due and payable in accordance with the provisions of said mortgage; that default was also made in the payment of the several installments of interest on said bonds which became
248 due and payable in accordance with the provisions of said mortgage; that default was also made in the payment of the several installments of interest on said bonds which became due and payable respectively on the 1st day of September, 1885, and the 1st day of March, 1886; that the whole principal of said Cincinnati and Georgia Division bonds, to wit, two million dollars, has become and is due and payable from said defendant, The East Tennessee, Virginia and Georgia Railroad Company, in accordance with the provisions of said last-mentioned mortgage, and that there is also in arrear and due from said last-named defendant as interest on said bonds the sum of one hundred and eighty thousand dollars in gold coin of the United States, with interest at six per cent. per annum on $60,000, part thereof, from March 1st, 1885; on $60,000, part thereof, from September 1st, 1885, and on $60,000, part thereof, from March 1st, 1886.

XII. The court further finds that the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, has failed and omitted to perform the stipulations of the said Cincinnati and Georgia Division bonds, and that default has been made by the said
249 defendants, The TennesseeState Line Railroad Company and The East Tennessee, Virginia and Georgia Railroad Company, and each of them in the performance of the covenants contained in said Cincinnati and Georgia Division mortgage, and that the said conveyance therein contained has become absolute; that prior to the time of filing the amended and supplemental bill in this suit

and after said default had continued for more than three months the complainant was duly requested by the holders of all the said last-mentioned bonds outstanding as aforesaid, and in respect to which or the coupons upon which such default had been made, to foreclose said mortgage and to enforce the lien thereof, as well as the lien of the two mortgages made by the defendant Thomas hereinafter described.

That in and by said Cincinnati and Georgia Division mortgage the defendant The Tennessee State Line Railroad Company agreed to and did waive, in the event that the property mentioned therein and conveyed thereby was decreed to be sold under the judgment or decree of a competent court in the suit for the foreclosure of said mortgage, any benefit and advantage of any and all valuation, stay, appraisement, extension, or redemption law or laws of the
250 States of Tennessee and Georgia, otherwise applicable to such a sale, and also any and all right of redemption which it might otherwise be entitled to under any such laws, whether then existing or thereafter enacted.

That in the month of March, 1886, the said defendant, The Tennessee State Line Railroad Company, conveyed to the defendant The East Tennessee, Virginia and Georgia Railroad Company all the property embraced in and covered by said Cincinnati and Georgia Division mortgage, subject to the lien of said mentioned mortgage.

XIII. The court further finds that on or about the 1st day of April, 1883, the defendant Samuel Thomas made, executed, and delivered to the complainant, The Central Trust Company of New York, as trustees, a certain instrument of conveyance in the nature of a mortgage, bearing date on said last-mentioned day, whereby he granted, bargained, sold, and conveyed to said Central Trust Company of New York, its successors and assigns, certain real property and premises therein particularly described, and also particularly described in the amended and supplemental bill of complaint in this suit, at folios 66 to 153 of said amended and supplemental bill, in trust for the further security of said Cincinnati and Georgia Divis-
251 ion bonds and the coupons appertaining thereto, and conditioned in substance that in case of default in the payment of the principal or interest of said last-mentioned bonds the said trustees should proceed to realize the benefit of said security according to the course and practice of courts of chancery in like cases, and that said conveyance or mortgage was duly recorded in the several counties in the State of Georgia wherein said last-mentioned mortgage property was situate.

That on or about the 14th day of October, 1884, the said defendant, Samuel Thomas, made, executed, and delivered to the said Central Trust Company of New York, as trustee, a certain other instrument of conveyance in the nature of a mortgage, bearing date on said last-mentioned day, whereby he granted, bargained, sold, and conveyed to said Central Trust Company of New York, its successors and assigns, certain real property and premises therein particularly described, and also particularly described in the

amended and supplemental bill in this suit at folios 157 to 160 thereof (both inclusive), in trust, for the further security of said Cincinnati and Georgia Division bonds and the coupons appertaining thereto, and conditioned in substance that in case of default in the payment of the principal and interest of said last-men-
252 tioned bonds the said trustee should proceed to realize the benefit of said security according to the course and practice of courts of chancery in like cases and that said last-mentioned conveyance or mortgage was duly recorded in the county of Fulton, Georgia, wherein said last-mentioned mortgaged property was situate.

That on or about the 15th day of February, 1886, the said defendant, Thomas, conveyed all the property and premises described in said last two mentioned conveyances or mortgages to the defendant The East Tennessee, Virginia and Georgia Railroad Company, subject, however, to said respective mortgages.

XIV. The court further finds that the property and premises described in said amended and supplemental bill of complaint, to wit, the property described in said consolidated first mortgage and said Cincinnati and Georgia Division mortgage and in the said two mortgages made by said Samuel Thomas, form and were intended to form a single system of railway, each part of which is and will be necessary to the ordinary and convenient use of any other part, and the value of which in portions or sections is and will be much less than its value as a whole; that the said Cincinnati and Georgia division as described in said Cincinnati and
253 Georgia Division mortgage and the property described in the mortgages made by said Thomas has always been operated, managed, and controlled by the defendant The East Tennessee, Virginia and Georgia Railroad Company, and that it is necessary and important for the interests of the holders of all the bonds secured by said several mortgages that the said mortgaged premises should all be sold together and in one parcel, and that the said mortgaged premises embraced within the terms of said several mortgages are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

XV. The court further finds that an agreement for the purchase and reorganization in respect to all the railroad property and appurtenances described in said amended and supplemental bill of complaint has been made, to which the holders of a large majority of said consolidated first-mortgage bonds and of all of said Cincinnati and Georgia Division bonds have become parties, a true copy of which agreement is annexed to said amended and supplemental bill, marked "Exhibit C."

254 It is therefore considered, adjudged, and decreed, and this court, by virtue of the power and authority in it vested, doth order, adjudge, and decree, that the said defendant, The East Tennessee, Virginia and Georgia Railroad Company, shall, within ten (10) days from the date of this decree, pay or cause to be paid into the registry of this court, for the use and benefit of the holders of the said consolidated first-mortgage bonds and the coupons apper-

taining thereto, the several sums of money so as aforesaid decreed and adjudged to be due and payable upon said consolidated first-mortgage bonds and coupons respectively, and also for the use and benefit of the holders of the said Cincinnati and Georgia Division bonds and the coupons appertaining thereto, and the several sums of money so as aforesaid decreed and adjudged to be due and payable upon said Cincinnati and Georgia Division bonds and coupons respectively, and also the costs of suit taxed in this cause and in the several causes pending between the parties hereto under ancillary bills filed in the circuit court of the United States for the northern district of Georgia, the southern district of Georgia, the northern district of Alabama, the middle district of Alabama, and the
255 southern district of Mississippi and all the fees and expenses allowed by this court and either of said courts.

And in case of such payments being made the said bonds and coupons as to which payment shall have been made shall be thereupon surrendered to said defendant, The East Tennessee, Virginia and Georgia Railroad Company.

And the aggregate sums of money aforesaid, together with the interest thereupon, and such further sums as may hereafter be allowed and declared by this court or either of said other courts to be liens prior in right to the said mortgages, are hereby declared to be a lien or charge upon the property, real and personal, of said East Tennessee, Virginia and Georgia Railroad Company set forth in said amended and supplemental bill of complaint, including all the property acquired by said railway company since the date of said consolidated first mortgage or by the receiver heretofore appointed in this suit and said ancillary suits or either of them—that is to say, the said sums other than the amounts adjudged to be due upon the bonds and coupons aforesaid constitute a lien upon all of said property; the amounts adjudged to be due upon the consoli-
256 dated first-mortgage bonds and coupons constitute liens upon the property described in said consolidated first mortgage and upon the Memphis and Charleston Railroad Company stock and the $200,000 Cincinnati and Georgia Division bonds mentioned in said amended and supplemental bill, but do not constitute a lien upon the Knoxville and Ohio railroad or upon the property included in the Cincinnati and Georgia Division mortgage except subject to said Cincinnati and Georgia Division mortgage or upon the property described in the two mortgages made by Samuel Thomas except subject to said two mortgages respectively; the amounts adjudged to be due upon the Cincinnati and Georgia Division bonds and coupons constitute first and permanent liens (after costs and expense as aforesaid) upon the property mentioned and described in said Cincinnati and Georgia Division mortgage and said two mortgages made by said Samuel Thomas.

And it is further ordered, adjudged, and decreed that in default of such payment by said defendant, The East Tennessee, Virginia and Georgia Railroad Company, or by some or any of the parties to this suit or by the holders of the said income bonds within
257 the time aforesaid all the right, title, estate, interest, and

equity of redemption of the said several defendants, The East Tennessee, Virginia and Georgia Railroad Company, The Tennessee State Line Railroad Company, and Samuel Thomas, and of all persons represented by any party to this suit in and to the said property, premises, franchises, privileges, and immunities described in said several mortgages or which have since the respective dates thereof been acquired by the said several railroad companies or by Henry Fink, receiver, shall be forever barred and foreclosed, and that in default of such payment or any of them all the said property, premises, franchises, privileges, and immunities and the right, title, interest, and estate of the said several railway companies and of all the parties to this suit in and to the same shall be sold in one parcel and as an entirety by or under the direction of William Rule, special master in chancery of this court, without appraisement and without the benefit of any stay, valuation, redemption, or relief, in the manner and upon the terms hereinafter directed, in order to satisfy the amounts due as aforesaid, the costs and expenses of this proceeding, and of said ancillary suits and the said several sums herein decreed to bepaid, or to so much thereof as the pro-
258 ceeds of such sale shall suffice to pay, but in case of payment by the said parties or either of them or by any holder or holders of said income bonds of the amounts hereinbefore adjudged to be due and payable upon said consolidated first-mortgage bonds and coupons and of a proper proportionate part of the costs and expenses aforesaid, to be fixed by this court upon due application for such purpose, made within said period of ten (10) days from the date of this decree only the property and premises embraced in said Cincinnati and Georgia Division mortgage and said two mortgages made by said Thomas shall be sold in the manner hereinafter provided to pay and satisfy the sums remaining unpaid for costs and expenses and the amounts due and payable on said Cincinnati and Georgia Division bonds and coupons.

That the said special master make the sale herein decreed to be made in accordance with the course and practice of this court; that at such sale the complainant or any of the parties to this suit may become the purchaser or purchasers; that said sale shall be at public auction to the highest bidder, and shall be made in Knoxville, in the State of Tennessee, at such time and place as the said
259 special master shall in and by the notice of such sale appoint not later than the 25th day of May, 1886; that notice of the time, place, and terms of such sale and of the property to be sold shall be given by said special master by publication of an advertisement thereof at least once in each week for the term of six weeks preceeding the day of sale in two newspapers published in each of the cities of New York, Knoxville, and Ghattanooga and in one newspaper in each of the cities of Atlanta, Ga., and Montgomery, Ala., and that said master proceed to publish such notice immediately upon the entry of this decree. In case of the exercise by any of the parties of the power of redemption hereinbefore provided, the said master may withdraw or modify said notice, as the circumstances may require; and it is further ordered that said sale shall

be made subject to any all outstanding mortgages covering or embracing the said property and premises or any part thereof as to the portions thereof which may be embraced in said mortgages respectively which constitute liens upon said property prior to the lien of the several mortgages foreclosed in this suit; and it is further ordered that said special master making such sale shall accept no bid from any bidder for a sum less than ten mill-
260 ion dollars or from any bidder who shall not, at the time of said sale, place in his hands, or deposit with him as a pledge that said bidder will make good his bid in case of its acceptance by the court the sum of one hundred thousand dollars in money; and it is further ordered that of the purchase price so bid not less than the sum of one hundred thousand dollars shall be paid in cash, and the balance of said purchase price shall be paid either in cash or the purchaser at said sale shall have the right to satisfy said remainder of his bid, in whole or in part, by paying over and surrendering any of the said consolidated first-mortgage bonds and overdue and unpaid coupons belonging thereto, and said Cincinnati and Georgia Divison bonds and overdue and unpaid coupons belong-thereto at such price or value as will be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the entire amount of the bid were paid in cash, it being understood and hereby decreed that the holders of said several bonds and coupons shall all be entitled to be paid ratably and *pro rata* out of the proceeds of said sale without distinction as between bonds and coupons or as between consolidated first-mortgage bonds and coupons
261 and Cincinnati and Georgia Division bonds and coupons, but none of said bonds or coupons shall be received in payment of any portion of said purchase price until all the costs and expenses aforesaid and the expenses of sale shall have been fully paid and satisfied; and the purchaser or purchasers of the said property at said sale shall, as a part of the consideration of the purchase and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages prior to said mortgages foreclosed in this suit and subject to which said property shall be sold, and also upon the further express condition that he or they will pay off, satisfy, and discharge all debts, claims, and demands, of whatsoever nature, incurred or which may hereafter be incurred by said receiver, Henry Fink, and which have not been or shall not hereafter be paid by
262 said receiver or other parties in interest herein.

And said purchaser or purchasers, their successor or successors or assigns, shall have the right to appear and make defense to any claim, debt, or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or suc-

cessors or assigns, shall also have the right to enter appearance in this or any other court and contest any claim or demand pending and undetermined at the date of the confirmation of such sale. All claims, debts, and demands accruing during the receivership herein shall be barred unless presented, as hereinafter provided, within six months of the confirmation of said sale.

And jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this article of this decree, and the court hereby reserves the right to resell the said premises upon failure to comply within twenty days with the provisions of this or any order of the court touching the performance by the purchaser or purchasers of the terms and conditions of said sale.

And it is further ordered that out of the purchase-money received by said special master from said sale there shall be paid when ordered by the court:

263 First. The costs of suit accrued both in this court and in the other courts hereinafter mentioned, together with the costs and expenses of executing this decree.

Second. The compensation of The Central Trust Company of New York, complainant herein, for its services, charges, and expenses in the execution of the trusts and the compensation and expenses of the solicitors and counsel for said complainant, said sums to be ascertained, fixed, and determined by this court upon the confirmation of said sale.

Third. Such sums as may upon the confirmation of said sale be awarded by the court for the compensation and expenses of said receiver, Henry Fink, and of his solicitors and counsel.

Fourth. Such sums as shall have been decreed and adjudged by this court or either of the said courts to be prior and paramount in equity to the lien of said several mortgages and which shall not have been otherwise paid.

Fifth. He shall apply any residue of said proceeds which may remain after the payment of the sums aforesaid and the ascertained and unpaid debts of the receivership to the payment of the principal and interest due, owing, and unpaid upon the said con-

264 solidated first-mortgage bonds and coupons and said Cincinnati and Georgia bonds and coupons, and if the proceeds of said sale after the other payments hereinbefore provided to be made shall not be sufficient to pay said bonds, interest and principal, in full the said remaining proceeds shall be divided *pro rata* among said bonds and coupons without preference of one over the other or of interest over principal, and the amount which each bond and coupon shall thus become entitled to shall be credited upon said bonds and coupons.

In case the amount of the proceeds of sale shall be more than sufficient after payment of all said costs and expenses, debts and expenses of the receivership, and claims adjudged by said courts to be prior and paramount in equity to the lien of said respective mortgages (exclusive of prior mortgage claims) and the amount of the principal and interest of said consolidated first-mortgage bonds and Cincinnati and Georgia Division bonds as aforesaid to date of

payment, then the overplus shall be paid to the Central Trust Company of New York, as trustee, under the said income mortgage for the benefit of the holders of said income bonds, and if there should be any surplus of said proceeds such surplus
265 shall be paid to said East Tennessee, Virginia and Georgia Railroad Company; that said special master shall give proper notice, by publication once a week for four weeks in one newspaper in each of the cities of Knoxville, Tenn., Atlanta, Ga., and Montgomery, Alabama, to any and all persons, other than bondholders, entitled to share in the distribution of said proceeds of sale, to present their demands and the evidence thereof for payment of the respective amounts to be paid thereon on presentation to this court or such other courts as have jurisdiction of this cause within the time limited herein.

And it is further ordered, adjudged, and decreed that the purchaser or purchasers of the property herein ordered to be sold shall be invested with and shall hold, possess, and enjoy the said premises and the property herein directed to be sold, whether owned at the commencement of this suit or since acquired, and the rights, privileges, and franchises appertaining thereto, as fully and completely as said East Tennessee, Virginia and Georgia Railroad Company, said Tennesse State Line Railroad Company, and Samuel Thomas, defendants herein, now hold and enjoy or at the time of the commencement of this suit or at the time of filing the
266 amended and supplemental bill herein held and enjoyed or are or were entitled to hold or enjoy the same, and at the time of the execution of the said deed the said Henry Fink, receiver, shall, as the court shall hereafter direct, make, execute, and deliver to the said purchaser or purchasers a good and sufficient deed of conveyance in fee simple of any and all property vested in or standing in the name of said receiver or to which said receiver has in any manner acquired title, and that at the same time the said Central Trust Company of New York shall also, as the court shall hereafter direct, make, execute, and deliver to said purchaser or purchasers a good and sufficient deed of conveyance of all property vested in it as trustee under said several and respective mortgages, and that said purchaser or purchasers shall have and be entitled to hold said railroads and property free and discharged from the lien or encumbrance of the said consolidated first mortgage and income mortgage, said Cincinnati and Georgia Division mortgage, and said two mortgages of said Thomas, and from the claims of all parties to this suit and of each and every person whose interests are in any manner represented by any
267 party to this suit except as hereinbefore provided.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the said purchaser or purchasers, his or their representatives or assigns, shall be let into possession of the said mortgaged premises on demand after confirmation of the sale so to be made by said special master.

And it is further ordered that said special master make report to

this court of all his proceedings in the premises with all convenient speed after said sale shall have taken place.

The property embraced in and covered by said mortgages which is hereby directed to be sold and which is now in the actual possession of Henry Fink, receiver, or of the complainant, The Central Trust Company of New York, is as follows, viz: All the right, title, and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company or of Henry Fink, receiver, or of any of the parties to this cause in and to "all and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, franchises, easements, covenants, and contracts of all and every kind at any time held and owned or occupied by or
268 belonging — the said East Tennesseee, Virginia and Georgia Railroad Company, including all and singular its lines of railroad from and including the terminus and depot at Bristol, in the county of Sullivan, State of Tennessee, and thence two hundred and forty-two miles, more or less, via Knoxville, to the city of Chattanooga, in the county of Hamilton, in said State of Tennessee, and including the line of railroad of said East Tennessee, Virginia and Georgia Railroad Company from Cleveland, in the county of Bradley, in said State of Tennessee, thirty miles, more or less, to Dalton, in the county of Whitfield, in the State of Georgia, and including the branch line from Ooltewah, in the county of James, to Red Clay, in county of Bradley, in the State of Tennessee,* twelve miles, more or less, and also including the line of railroad of the East Tennessee, Virginia and Georgia Railroad Company, commencing in the city of Selma, in the county of Dallas, in the State of Alabama, and extending thence in a northeasterly direction continuously through the counties of Dallas, Autauga,
Perry, Bibb, Shelby, Talladega, Calhoun, and Cherokee,
269 in said State of Alabama, one hundred and seventy miles, more or less, to the line of the State of Georgia, and thence in the said State of Georgia, through the county of Floyd, by way of Rome, in the last-named county, and also through the counties of Gordon and Whitfield, to the town of Dalton, in the last-named county and State, sixty-five miles, more or less, and then terminating at a point or points of connection with the Western and Atlantic railroad and with the other lines of railroad of the said railroad company hereinbefore referred to, and also including the line of railroad of said railroad company extending from Morristown, in the State of Tennessee, to Paint Rock, at or near the State line between the States of Tennessee and North Carolina, forty-five miles, more or less, and also including the line of railroad of the railroad company from Rome, in the county of Floyd, by way of Atlanta and Macon, to Brunswick, in the county of Glynn, and from Cochran to Hawkinsville, both in the county of Pulaski, all in the State of Georgia, three hundred and seventy-eight miles, more or less, and also including the line of rail-

(* Should read in the county of Whitfield, in the State of Georgia.)

road of the said railroad company from Selma, in the county
270 of Dallas, in the State of Alabama, by way of Lauderdale, to Meridian, in the county of Lauderdale, in the State of Mississippi, one hundred and thirteen miles, more or less, and being in all one thousand one hundred and twenty-three miles, more or less, and also all and singular the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds, and lands procured, provided, or intended for use for that purpose, lands used or procured or intended for sidings, all building-, structures, erections, improvements, leases, and leasehold interests, contracts, choses in action, easements, and privileges at any time belonging or appertaining to or used or procured or designed to be used for the purposes of or in connection with the said line of railroad or the maintenance or operation thereof or of any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all other rolling stock or equipment, and all machinery, tools, and implements, rails, chairs, and spikes, and other materials at any time owned or possessed by
271 the said railroad company or by Henry Fink, receiver thereof, for the uses or purposes of or designed for use in connection therewith, or for the operation, maintenance, or reparation of the said lines of railroad or any part thereof or the equipment or appurtenances thereof, and also all and singular the rights, privileges, and franchises which the said railroad company or Henry Fink, receiver thereof, at any time held, possessed, or was entitled unto, and also all the rights, privileges, and franchises which the said railroad company at any time acquired or became possessed of or entitled unto for or in respect of or for the uses and purposes of the said lines of railroad or the operation or maintenance of the same or any part thereof, and also all the tolls and income of the said lines of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid or any of them or any part thereof, and the reversion or reversions, remainder or remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said
272 East Tennessee, Virginia and Georgia Railroad Company and Henry Fink, its receiver, of, in, and to the same and every part and parcel thereof.

Also all the right, title, and interest of the said East Tennessee, Virginia and Georgia Railroad Company, as well as of the Central Trust Company of New York, of, in, and to $2,400,000 of the capital stock of the Memphis and Charleston Railroad Company, and all the shares owned by the East Tennessee, Virginia and Georgia Railroad Company or held in trust for said company by E. H. R. Lyman or others of the capital stock of the Knoxville and Ohio Railroad Company, $200,000 par value of the Cincinnati and Georgia Division bonds of the East Tennessee, Virginia and Georgia

Railroad Company, heretofore deposited with said Central Trust Company of New York pursuant to the terms and provisions of a judgment or decree of the circuit court of the United States for the eastern district of Tennessee, in the suit of The Mayor and Alderman of Knoxville against the Knoxville and Ohio Railroad Company and others.

Also all the right, title, and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company and the Tennessee State Line Railroad Company and of
273 Samuel Thomas and of said receiver, or any or either of them or of any of the parties to this cause, in and to "all and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind held and owned or occupied by or belonging to the said East Tennessee, Virginia and Georgia Railroad Company and the Tennessee State Line Railroad Company, including all and singular the lines of railroad of the said Tennessee State Line Railroad Company from and including the terminus and depot at Ooltewah, in the county of James, in the State of Tennessee, and thence to or near to Red Clay, in the county of Whitfield, in the State of Georgia, and also all and singular the lands, roadways, tracks, superstructure, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds, and lands procured, provided, or intended for use for that purpose; lands used or procured or
274 intended for sidings; all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges used or procured or designed to be used for the purpose of or in connection with said line of railroad or the maintenance or operation of the same or of any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars and other cars, and all other rolling stock or equipment, and all machinery, tools and implements, rails, chairs, and spikes, and other materials whatsoever at any time owned or possessed by the said Tennessee State Line Railroad Company or its successors for the uses or purposes of or designed for use in connection with or for the operation, maintenance, or reparation of the said line of railroad or any part thereof, or the equipment or appurtenances thereof, and also all and singular the rights, privileges, and franchises which the said last-mentioned company at any time held, possessed, or was entitled unto, and also all the rights, privileges, and franchises which the said last-mentioned company acquired or became possessed of or entitled unto for or in respect of or for the uses or purposes of the said line of railroad or the operation
275 or maintenance of the same or any part thereof, and also all the tolls and income of the said line of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid or any of them or any part thereof

and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said railroad companies or either of them of, in, and to the same and every part and parcel thereof.

Also all the property and premises mentioned and described in a certain instrument of conveyance in the nature of a mortgage made by Samuel Thomas to the Central Trust Company of New York, dated April 1st, 1883, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on June 30th, 1883, in Mortgage Book K, pages 754 to 770, inclusive, and in the office of the clerk of the superior court of Bibb county, Georgia, on October 15th, 1883, in Book III, at folios 75 to 101, inclusive.

Also all the property mentioned and described in a certain
276 instrument of conveyance in the nature of a mortgage made by Samuel Thomas to the Central Trust Company of New York, dated October 14th, 1884, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on December 9th, 1884, in Book L, page 795," &c.

The court hereby expressly reserves for further consideration all matters pertaining to said cause.

Filed in court March 18th, 1886.

277 In the Circuit Court of the United States for the Eastern District of Tennessee.

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant, *against* THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and Others, Defendants. } In Equity. No. 787.

Amendment and Supplement to Decree of Foreclosure and Sale.

Now comes the complainant, The Central Trust Company of New York, and prays that the decree of foreclosure and sale entered in this cause on the 18th day of March, 1886, may be amended and modified in the respects hereinafter set forth without prejudice to any and all proceedings heretofore had and taken under said decree, and thereupon, the solicitors for the several parties in this cause thereunto consenting, upon consideration thereof, it is ordered, adjudged, and decreed as follows, namely:

I. So much of said decree of March 18th, 1886, as finds and adjudges the amount of the principal and interest of the bonds known
278 as the Cincinnati and Georgia Division bonds and the validity thereof and of the mortgage securing the same and the default in respect thereto is hereby vacated and set aside, and leave is hereby granted to the Central Trust Company of New York, as trustee under said Cincinnati and Georgia Division mortgage, to take such proceedings as it may be advised to enforce the terms and provisions of said bonds, coupons, and mortgages and to foreclose said Cincinnati and Georgia Division mortgage in like

manner as if such foreclosure had not been prayed in the amended and supplemental bill of complaint herein.

II. So much of said decree of March 18th, 1886, as adjudges and decrees that the defendant The East Tennessee, Virginia and Georgia Railroad Company shall pay into court, for the use and benefit of the Cincinnati and Georgia Division bonds and the coupons appertaining thereto, the several sums of money which by said decree are adjudged to be due and payable upon said Cincinnati and Georgia Division bonds and coupons respectively is hereby vacated and set aside.

III. So much of said decree as declares and adjudges that the amounts due upon the consolidated first-mortgage bonds and
279 coupons do not constitute a lien upon the property included in the Cincinnati and Georgia Division mortgage except subject to the said Cincinnati and Georgia Division mortgage, or upon the property described in the two mortgages made by Samuel Thomas except subject to said two mortgages respectively, shall not be held or taken to adjudge or determine the validity of the said Cincinnati and Georgia Division mortgage or of said mortgages made by said Thomas or either of them.

IV. So much of said decree of March 18, 1886, as provides that in default of payment by the defendant The East Tennessee, Virginia and Georgia Railroad Company or by some or any of the parties or by the holders of income bonds the right and equity of redemption of the parties in and to the property described in the several mortgages shall be barred and foreclosed shall not be held or taken to foreclose the right and equity of redemption under said Cincinnati and Georgia Division mortgage or under the mortgages of said Thomas.

V. The special master appointed in and by said decree in making sale of the property described in said Cincinnati and Georgia Division mortgage and in the mortgages made by said Thomas shall
280 sell the same subject to the lien, if any there be, of said mortgages respectively.

VI. So much of said decree of March 18, 1886, as provides that "in case of payment by the said parties or either of them or by any holder or holders of said income bonds of the amount hereinbefore adjudged to be due and payable upon said consolidated first-mortgage bonds and coupons and of a proper proportionate part of the costs and expenses aforesaid, to be fixed by the court upon due application of such purpose, made within said period of ten days from the date of this decree, only the property and premises embraced in said Cincinnati and Georgia Division mortgage and said two mortgages made by said Thomas shall be sold in the manner hereinafter provided to pay and satisfy the sum remaining unpaid for costs and expenses and the amounts due and payable on said Cincinnati and Georgia Division bonds and coupons" is hereby vacated and set aside.

VII. So much of said decree of March 18, 1886, as provides that the purchaser of said sale shall have the right to satisfy any part of

his bid by paying over and surrendering said Cincinnati and
281 Georgia Division bonds or any thereof or any overdue and unpaid coupons belonging thereto is hereby vacated and set aside.

VIII. The said Cincinnati and Georgia Division bonds and coupons shall not be entitled to payment or to dividends out of the proceeds of sale, and so much of said decree as provides for the application of any part of such proceeds to the payment of any principal or interest of said Cincinnati and Georgia Division bonds or coupons is hereby vacated and set aside.

IX. So much of said decree as provides that the purchaser or purchasers at such sale shall have or be entitled to hold the property sold free and discharged from the lien of said Cincinnati and Georgia Division mortgage and of the two mortgages of said Thomas is hereby vacated and set aside.

X. And it is further ordered, adjudged, and decreed that the time allowed by said decree of March 18th, 1886, to the several parties and to the holders of the income bonds within which to pay into court the amounts found to be due and payable upon the consolidated first-mortgage bonds and coupons and the costs of suit and receivership, to wit, the period of ten days, be, and is hereby,
282 extended to and including the 24th day of May, 1886, but not later, and unless such payments be made on or before the said 24th day of May, 1886, the sale directed by said decree as hereby modified shall be made.

XI. The several amendments and modifications of the said decree hereby made are made without prejudice to any and all the proceedings heretofore had or taken under said decree, and said decree, except as hereby amended and modified, shall stand and continue in full force and effect in all respects.

The said master shall proceed to publish, in connection with the notice or advertisement now in the course of publication, a supplemental notice modifying such notice so as to conform to the provisions of this amendment and supplement to said original decree, and the publication of such supplemental notice shall begin as soon as conveniently may be after the entry hereof.

HOWELL E. JACKSON,
Circuit Judge.

Jackson, Tenn., April 26th, 1886.

283 U. S. Circuit Court, Eastern District of Tennessee.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co. *et al.* } In Equity.

Consent is hereby given to the entry of the decree in the above-entitled cause, signed by Hon. H. E. Jackson, judge of said court, on April 26th, 1886, said decree to be entered in all the districts

and circuits in which said original bill or ancillary bills are pending.

H. L. TERRELL,
Solicitor for Defendants.

The clerk of the United States circuit court at Knoxville, Tenn., will enter the above and foregoing decree on the minutes of the court in the above-entitled cause.

HOWELL E JACKSON,
Circuit Judge.

Jackson, Tenn., April 26th, 1886.

Filed in court April 29th, 1886.

284 In the Circuit Court of the United States for the Eastern District of Tennessee.

CENTRAL TRUST COMPANY OF NEW YORK *vs.* EAST TENN., VIRGINIA & GEORGIA RAILROAD COMPANY *et al.* } In Equity. No. 787.

To the honorable the judges of said court:

In obedience to the decree entered herein on the 18th day of March, 1886, and the supplemental decree, dated the 26th day of April, 1886, entered in the above cause, and the order dated May 19th, 1886, the undersigned, as special master, begs leave to report that after having advertised, as required by said decrees, he did, on the 25th day of May, 1886, expose all of the said property described in said decrees and in the mortgages sought to be foreclosed in said suit to public sale at the door in front of the custom-house building, in Knoxville, Tennessee, upon the terms and conditions prescribed in said decrees. At said sale the said property as described in said decrees and mortgages was bid off by Frederic P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D.
285 Tappan, George Warren Smith, and Edward W. Corlies for the sum of ten million two hundred and fifty thousand dollars, one hundred thousand dollars of which said sum was paid to him in cash in hand, and the same is subject to the order of the court.

The balance of said bid the said purchasers propose to discharge in the consolidated five per cent. bonds of the East Tennessee, Virginia and Georgia Railroad Company and the unpaid coupons belonging thereto as provided for in said decrees.

All of which is respectfully submitted this 25th day of May, 1886.

WM. RULE,
Special Master.

Filed in court May 26th, 1886.

286 In the Circuit Court of the United States for the Eastern District of Tennessee.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co. *et al.*
In Equity. No. 787.

To the honorable the judges of said court:

The undersigned, as special master under the decree entered herein on March 18th, 1886, and the supplemental decree herein, dated April 26th, 1886, entered in the above cause, begs leave further to report that since the date of his report of sale herein, to wit, the 25th day of May, 1886, the purchasers at said sale have paid over to him all the balance of the amount bidden by them at the sale herein by delivering to him the following bonds and coupons, pursuant to the said decrees—that is to say:

12,674 consolidated first-mortgage bonds of the East Tenn., Va. & Ga. R. R. Company, dated July 1st, 1880, par value $12,674,000.00, with coupons annexed from and including the coupon due January 1st, 1885.

287 1,924 consolidated first-mortgage bonds of said railroad company of same date, par value $1,924,000.00, with coupons annexed from and including the coupon due, which will come due January 1st, 1887.

1,905 coupons belonging to said bonds, due January 1st, 1885, of the par value of $47,625.00.

1,905 coupons, due July 1st, 1885, of the par value of $47,625.00.

1,905 coupons, due Jan'y 1st, 1886, of the par value of $47,625.00.

1,903 coupons, du*ly* July 1st, 1887, of the par value of $47,575.00.

All of which I hold subject to the order of the court herein.

I further report that my necessary expenses for advertising and publishing the notices required by said decrees amount to the sum of..... $1,475 70

And my necessary expenses for travelling and telegrams to the sum of..... 85 30

Making in all..... $1,561 00

All of which is respectfully submitted.

WM. RULE,
Special Master.

Dated June 28th, 1886.

Filed in court June 28th, 1886.

288 In the Circuit Court of the United States for the Eastern District of Tennessee, at Knoxville.

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
against
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY and Others, Defendants.

In Equity. No. 787.

Decree Confirming the Sale of the East Tennessee, Virginia and Georgia Railroad.

And now, on this the 28th day of June, 1886, this cause came on further to be heard upon the application of the complainant, The Central Trust Company of New York, to confirm the sale made under the decree and supplemental decree herein on the 25th day of May, 1886, by William Rule, Esq., special master appointed for the purpose by the said decree of this court, to Frederick P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D. Tappen, George Warren Smith, and Edmund W. Corlies, acting as a committee on behalf of bondholders as purchasing trustees, and upon producing the report of the said sale made by the said special master, which was filed on the 28th day of May, 1886, and no exceptions to
289 said report having been filed, and sufficient notice of the hearing of the said application having been given to the solicitors for the parties to this cause, and the court having fully examined the report of the sale of the said special master and his doings in pursuance of the decree of sale herein, and finding the same correct and in all respects in conformity to law and with the orders and decrees of this court, and that the amount bidden at such sale, as reported by said special master in said report of sale, to wit, the sum of ten million two hundred and fifty thousand ($10,250,000) dollars, was the highest and best bid for the premises and property, rights, and franchises so ordered to be sold by him at said time, and it appearing to the satisfaction of the court that Robert Fleming, one of said purchasing trustees, had assigned his interest in such bid to the other purchasing trustees as aforesaid, and it also appearing from the report of said master that the said purchasers, Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappen, George Warren Smith, and Edmund W. Corlies, have paid in full the amount of said purchase price in the manner provided in and by the decree of sale herein; it is now, therefore, ordered,
290 adjudged, and decreed that the said sale be, and the same is hereby, ratified, approved, and confirmed in all respects, and the said report of sale made by the said special master and all the proceedings of the said special master in that regard be, and the same are hereby, in all respects approved and confirmed.

And it is further ordered, adjudged, and decreed that the said William Rule, Esq., the special master herein, forthwith make and execute a proper instrument in writing conveying to the said Frederick P. Olcott, Charles M. McGhee, Frederick D. Tappen, George Warren Smith, and Edmund W. Corlies, acting as a committee on

behalf of bondholders as purchasing trustees, or to their assigns, as joint tenants and not as tenants in common, all and singular the property, premises, rights, and franchises described in the decree of sale heretofore entered in this cause by this court on the 18th day of March, 1886, as modified by the amended and supplemental decree in this cause entered on the 29th day of April, 1886, and all the right, title, & interest, at law or in equity, of all the parties to this suit in and to the same or any part thereof and deliver the same to the said purchasers or their assigns or their agents
291 or attorney; and the said purchasers and their assigns are hereby subrogated to all the rights of all lienholders parties to this suit in and to said property, rights, and franchises, and that the description of said property and franchises conveyed by said deed to be set forth in said deed in the words and figures following, namely: All the right, title, and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company or of Henry Fink, receiver, or of any of the parties to this cause in and to "all and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, immunities, franchises, easements, rights under lease, terms and parts of terms, agreements, covenants, and contracts of all and every kind, at any time held and owned or occupied by or belonging to the East Tennessee, Virginia and Georgia Railroad Company, including all and singular its line of railroad from and including the terminus and depot at Bristol, in the county of Sullivan, State of Tennessee, and thence two hundred and forty-two miles, more or less, via Knoxville, to the city of Chattanooga, in the county of Hamilton, in said State of Tennessee, and including the line of railroad of said
292 East Tennessee, Virginia and Georgia Railroad Company from Cleveland, in the county of Bradley, in said State of Tennessee, thirty miles, more or less, to Dalton, in the county of Whitfield, in the State of Georgia, and including the branch line from Ooltewah, in the county of James, to Red Clay, in the county of Whitfield, in the State of Georgia, twelve miles, more or less, and also including the line of railroad of the East Tennessee, Virginia and Georgia Railroad Company commencing in the city of Selma, in the county of Dallas, in the State of Alabama, and extending thence in a northeasterly direction continuously through the counties of Dallas, Autauga, Perry, Bibb, Shelby, Talledega, Calhoun, and Cherokee, in said State of Alabama, one hundred and seventy-two miles, more or less, to the line of the State of Georgia, and thence in the said State of Georgia through the county of Floyd by way of Rome, in the last-named county, and also through the counties of Gordon and Whitfield to the town of Dalton, in the last-named county and State, sixty-five miles, more or less, and then terminating at the point or points of connection with the Western and Atlantic railroad, and with the other lines of railroad of the said railroad company hereinbefore referred to, and also including
293 the line of railroad of said railroad company extending from Morristown, in the State of Tennessee, and North Carolina, forty-five miles, more or less, and also including the line of railroad

of the — railroad company from Rome, in the county of Floyd, by way of Atlanta and Macon to Brunswick, in the county of Glynn, and from Cochran to Hawkinsville, both in the county of Pulaski, all in the State of Georgia, three hundred and seventy-eight miles, more or less; and also including the line of railroad of the said railroad company from Selma, in the county of Dallas, in the State of Alabama, by way of Lauderdale to Meridian, in the county of Lauderdale, in the State of Mississippi, one hundred and thirteen miles, more or less, and being in all one thousand one hundred and twenty-three miles, more or less; and also all and singular the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds, and lands procured, provided, or intended for use for that purpose, lands used or procured or
294 intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges at any time belonging or appertaining to or used or procured or designed to be used for the purpose or in connection with the said line of railroad or the maintenance or operation thereof or of any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars and all other rolling stock and equipment and all machinery, tools and implements, rails, chairs and spikes, and other materials at any time owned or possessed by the said railroad company or by Henry Fink, receiver thereof, for the uses or purposes of or designed for use in connection with or for the operation, maintenance, or reparation of the said lines of railroad or any part thereof or for the equipment or appurtenances thereof, and also all and singular the rights, privileges, and franchises which the said railroad company or Henry Fink, receiver thereof, at any time held, possessed, or was entitled unto, and also all the rights, privileges, and franchises which the said railroad company at any time
295 acquired or became possessed of or entitled unto for or in respect of or for the uses or purposes of the said lines of railroad or the operation or maintenance of the same or any part thereof, and also all the tolls and income of the said lines of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises or any of them or any part thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and all the estate, right, title, interest, property, possession, claim, and demand whatsoever as well at law as in equity of the said East Tennessee, Virginia and Georgia Railroad Company and Henry Fink, its receiver, of, in, and to the same and every part and parcel thereof."

"Also all the right, title, and interest of the said East Tennessee, Virginia and Georgia Railroad Company as well as of the Central Trust Company of New York of, in, and to $2,400,000 of the capital stock of the Memphis and Charleston Railroad Company and all the shares owned by the East Tennessee, Virginia and Georgia

Railroad Company or held in trust for said company by E. H. R. Lyman or others of the capital stock of the Knoxville and
296 Ohio Railroad Company and $200,000 par value of the Cincinnati and Georgia Division bonds of the East Tennessee, Virginia and Georgia Railroad Company heretofore deposited with said Central Trust Company of New York pursuant to the terms and provisions of a judgment or decree of the circuit court of the United States for the eastern district of Tennessee in the suit of the Mayor and Aldermen of Knoxville against the Knoxville and Ohio Railroad Company and others."

Also all the right, title, and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company and the Tennessee State Line Railroad Company and of Samuel Thomas and of said receiver or any or either of them or of any of the parties to said cause in and to—

"All and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, franchises, easements, rights and leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind held and owned or occupied by or belonging to the said East Tennessee, Virginia and Georgia Railroad Company and the Tennessee State Line railroad, including all and singular the lines of railroad of the said Tennessee
297 State Line Railroad Company from and including the terminus and depot at Ooltewah, in the county of James, in the State of Tennessee, and thence to or near Red Clay, in the county of Whitfield, in the State of Georgia, and also all and singular the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, buildings, and repair shops, machine shops, depot grounds, and lands procured, provided, or intended for use for that purpose, lands used or procured for sidings, buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges used or procured or designed to be used for the purposes of or in connection with said line of railroad or the maintenance or operation of the same or any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all other rolling stock or equipment, and all machinery, tools and implements, rails, chairs, and spikes, and other materials whatever, at any time owned or possessed by the said Tennessee
298 State Line Railroad Company or its successors for the uses or purposes of or designed for use in connection with or for the operation, maintenance, or reparation of the said line of railroad or any part thereof; and also all and singular the rights, privileges, and franchises which the said last-mentioned company at any time held, possessed, or was entitled to; and also all the privileges and franchises which the said last-mentioned company acquired or became possessed of or entitled unto for or in respect of or for the uses or purposes of the said line of railroad or the operation or maintenance of the same or any part thereof; and also all the tolls and in-

come of the said line of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid or any of them or any part thereof, and the reversion and reversions, remainder or remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said railroad companies or either of them of, in, and to the same and every part and parcel thereof, subject, however, to the lien,
299 if any there be, of a certain mortgage made by the Tennessee State Line Railroad Company to the Central Trust Company of New York, dated March 1st, 1883."

"Also all the property and premises mentioned and described in a certain instrument of conveyance in the nature of a mortgage made by Samuel Thomas to the Central Trust Company of New York, dated April 1st, 1883, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on June 30th, 1883, in Mortgage Book K, pages 754 to 770, inclusive, and in the office of the clerk of the superior court of Bibb county, Georgia, on October 15th, 1883, Book III, at folios 75 to 101, inclusive, subject, however, to the lien, if any there be, of said last-mentioned instrument."

"Also all the premises and property mentioned and described in a certain instrument of conveyance in the nature of a mortgage made by Samuel Thomas to the Central Trust Company of New York, dated October 14th, 1884, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on December 9th, 1884, in Book L, page 795, etc., subject, however, to
300 the lien, if any there be, of said last-mentioned instrument."

And it is further ordered, adjudged, and decreed that the said purchasers shall take the said property, and that it be recited in said deed that they do take the said property subject to, and that the said purchasers assume and pay off any and all debts, claims, and demands of whatsoever nature now pending and undetermined in either of the courts in which the original and ancillary bills in this cause are pending which may be allowed and adjudged by this court or either of said courts where ancillary bills are pending, as prior to any right secured under the said consolidated first mortgage, under foreclosure of which the said sale was made, and subject likewise to all debts, claims, and demands of whatsoever nature incurred by Henry Fink, as receiver, in this cause, and which may remain unpaid at the termination of said Fink's receivership.

And it is further ordered, adjudged, and decreed that the said special master cancel the consolidated first-mortgage bonds and the coupons belonging thereto which have been received by him
301 on account of payment of the purchase price of said property so sold only where said bonds or coupons are taken at their full face value with interest, but that as to the bonds or coupons taken for any fractional part of their full face value the said master shall stamp upon the same the amount of percentage at which they are so taken, and shall return the same to the said purchasers, who

The East Tennessee, Virginia and Georgia Railroad Company, The Tennessee State Line Railroad Company, and Samuel Thomas, defendants, that all and singular the premises and property
307 mentioned in said judgment or decree and hereinafter described, be sold at public auction in the manner therein provided, and in accordance with the course and practice of said court, by and under the direction of the said William Rule, special master in chancery of said court, without appraisement and without the benefit of any stay, valuation, redemption or relief; that said sale be at public auction to the highest bidder, and be made in Knoxville, in the State of Tennessee, at such time and place as the said special master should in and by the notice of said sale appoint, not later than the twenty-fifth day of May, one thousand eight hundred and eighty-six; that notice of the time, place and terms of such sale, and of the property to be sold, be given by said special master, by publication of an advertisement thereof, at least once in each week for the term of six weeks preceding the day of sale, in two newspapers published in each of the cities of New York, Knoxville, and Chattanooga; that said special master, after said sale, make report to said court of all his proceedings, and that upon the completion and confirmation by the court of the sale so to be made, then that he execute and deliver to the purchaser or purchasers of the
308 said property, a good and sufficient deed of conveyance in fee simple, which deed should specify the property so purchased and the sum paid therefor; and,

Whereas, the said judgment or decree, and all and singular the terms and provisions thereof, were in all respects duly adopted and confirmed by the circuit court of the United States for the northern district of Georgia, the southern district of Georgia, the northern district of Alabama, the middle district of Alabama, and the southern district of Mississippi, and made the decree of said several and respective courts, in ancillary suits therein pending between the same parties complainant and defendant, as were parties in said suit in the circuit court of the United States for the eastern district of Tennessee, and,

Whereas, by an amended and supplemental decree duly made and entered in said last-mentioned suit on the twenty-ninth day of April, one thousand eight hundred and eighty-six, and adopted, confirmed and made the decree of said circuit courts of the United States for the northern district of Georgia, the southern district of Georgia, *the northern district of Georgia, the southern district of Georgia*, the northern district of Alabama, the middle dis-
309 trict of Alabama and the southern district of Mississippi, respectively, the said judgment or decree, was amended and modified in divers particulars; and

Whereas, the said special master, in pursuance of said judgments and decrees, and also of an order of the said circuit court of the United States for the eastern district of Tennessee, dated May nineteenth, one thousand eight hundred and eighty-six, did on the twenty-fifth day of May, one thousand eight hundred and eighty-six, sell at public auction, at the door of the United States custom-

house in Knoxville, in the State of Tennessee, the property and premises in the said judgments and decrees mentioned, due notice of the time and place and terms of said sale having been first given, agreeably to said judgments and decrees, at which sale the property and premises hereinafter described were struck off to the said parties of the second part and Robert Fleming as purchasing trustee, for the sum of ten million two hundred and fifty thousand dollars, that being the highest sum bidden for the same; and

Whereas, the said special master thereafter duly made and filed his report of said sale; and

310 Whereas, the said Fleming thereafter duly assigned his interest in said bid to the said Frederic P. Olcott, one of the parties of the second part; and said report and the said sale have been duly confirmed.

Now this indenture, witnesseth, that the said special master, the party of the first part to these presents, in order to carry into effect the sale so made by him, as aforesaid, in pursuance of the judgments or decrees aforesaid, and in conformity to the law, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey, unto the said parties of the second part as purchasing trustees, and as joint tenants, and not as tenants in common, the following-described property, and premises, namely:—

All the right, title and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company, or of Henry Fink, receiver, or of any of the parties to said cause, in and to,

311 "all and singular the estate and property, real, personal and mixed, and all fixtures, rights, privileges, immunities, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants and contracts, of all and every kind, at any time held or owned or occupied by or belonging to the East Tennessee, Virginia and Georgia Railroad Company, including all and singular its lines of railroad from and including the terminus and depot at Bristol, in the county of Sullivan, State of Tennessee, and thence two hundred and forty-two miles, more or less, via Knoxville, to the city of Chattanooga, in the county of Hamilton, in said State of Tennessee, and including the line of railroad, of said East Tennessee, Virginia and Georgia Railroad Company from Cleveland, in the county of Bradley, in said State of Tennessee, thirty miles, more or less, to Dalton, in the county of Whitfield, in the State of Georgia, and including the branch line from Ooltewah, in the county of James, in the State of Tennessee, to Red Clay, in the county of Whitfield, in the State of Georgia, twelve miles, more or less; and also including the line of rail-

312 road of the East Tennessee, Virginia and Georgia Railroad Company, commencing in the city of Selma, in the county of Dallas, in the State of Alabama, and extending thence in a northeasterly direction, continuously through the counties of Dal-

las, Autauga, Perry, Bibb, Schley, Talladega, Calhoun, and Cherokee, in said State of Alabama, one hundred and seventy-two miles, more or less, to the line of the State of Georgia, and thence in the said State of Georgia, through the county of Floyd, by way of Rome, in the last-named county, and also through the counties of Gordon and Whitfield to the town of Dalton, in the last-named county and State, sixty-five miles, more or less, and then terminating at the point or points of connection with the Western and Atlantic railroad, and with the other lines of railroad to the said railroad company hereinbefore referred to, and also including the line of railroad to said railroad company, from Rome, in the county of Floyd, by way of Atlanta and Macon, to Brunswick, in the county of Glynn, and from Cochran to Hawkinsville, both in the county of Pu-
313 laski; all in the State of Georgia, three hundred and seventy-eight miles, more or less, and also including the line of railroad of said railroad company, from Selma, in the county of Dallas, in the State of Alabama, by way of Lauderdale, in the State of Mississippi, one hundred and thirteen miles, more or less, and being in all one thousand one hundred and twenty-three miles, more or less; and also, all and singular, the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of ways, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds and lands, procured, provided and intended for use for that purpose, lands used or procured, or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in actions, easements, and privileges, at any time belonging or appertaining to, or used or procured or designed to be used, for the purpose of or in connection with the said line of railroad, or the maintenance and operation thereof, or of any part thereof, and also, all the locomotives, tenders, passenger cars,
314 baggage cars, freight cars, and other cars, and all other rolling stock and equipment, and all machinery, tools, and implements, rails, chairs, and spikes, and other materials, at any time owned or possessed by the said railroad company, or by Henry Fink, receiver thereof, for the uses or purposes of, or designed for use in connection with, or for the operation, maintenance or reparation of the said lines of railroad, or any part thereof, or the equipment or appurtenances thereof; and also, all and singular, the rights, privileges and franchises, which the said railroad company or Henry Fink, receiver thereof, at any time held, possessed or was entitled unto, for or in respect of, or for the uses or purposes of the said lines, of railroad, or the operation or maintenance of the same or any part thereof; and also all the tolls and income of the said lines of railroad, together with all and singular the tenements, hereditaments and appurtenances of the premises or any of them, or any part thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever as well at law as in equity, of the said East Tennessee, Virginia and Georgia Railroad Com-

pany; and Henry Fink, its receiver, of, in and to the same and every part & parcel thereof."

315 "Also, all the right, title and interest of the said East Tennessee, Virginia and Georgia Railroad Company, as well as of the Central Trust Company of New York, of, in and to two million four hundred thousand dollars ($2,400,000) of the capital stock of the Memphis and Charleston Railroad Company, and all the shares owned by the East Tennessee, Virginia and Georgia Railroad Company or held in trust for said company, by E. H. R. Lyman, or others, of the capital stock of the Knoxville and Ohio Railroad Company, and two hundred thousand dollars ($200,000) par value, of the Cincinnati and Georgia Division bonds of the East Tennessee, Virginia and Georgia Railroad Company, heretofore deposited with said Central Trust Company of New York, pursuant to the terms and provisions of a judgment or decree of the circuit court of the United States for the eastern district of Tennessee, in the suit of The Mayor and Aldermen of Knoxville against The Knoxville and Ohio Railroad Company, and others."

Also, all the right, title, and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company and the

316 Tennessee State Line Railroad Company, and of Samuel Thomas, and of said receiver, or any or either of them, or of any of the parties to said cause, in and to—

"All and singular, the estate and property, real, personal and mixed, & all fixtures, rights, privileges, franchises, easements, rights and leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind, held and owned, or occupied by, or belonging to the East Tennessee, Virginia and Georgia Railroad Company, and the Tennessee State Line railroad including, all and singular the lines of railroad of the said Tennessee State Line Railroad Company, from and including the terminus and depot at Ooltewah, in the county of James, in the State of Tennessee, and thence to, or near to Red Clay, in the county of Whitfield, in the State of Georgia, and, also,

All and singular, the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses,

317 warehouses, building and repair shops, machine shops, depot grounds, and lands procured, provided or intended for use for that purpose, lands used or procured for sidings, buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in actions, easements and privileges used or procured, or designed to be used for the purpose of, or in connection with, said line of railroad, or the maintenance or operation of the same or any part thereof, and also, all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all the rolling stock, or equipment, and all machinery, tools and implements, rails, chairs and spikes, and all other materials wh[illegible] of ever, at any time owned or possessed by the said Tennessee Line Railroad Company, or its successors, for the uses and author-

of, or designed for use, in connection with, or for the operation, maintenance, or reparation of the said line of railroad, or any part thereof, or the equipment or appurtenances thereof, and, all and singular, the rights, privileges and franchises which the said last-mentioned company at any time held, possessed or was entitled unto; and, also, all the privileges and fran-
318 chises which the said last-mentioned company at any time held, acquired, or became possessed of or entitled unto, for, or in respect of, or for the uses or purposes of said line of railroad, or for the operation or maintenance of the same, or any part thereof; and, also, all the tolls and income of the said line of railroad, together with, all and singular, the tenements, hereditaments and appurtenances of the premises aforesaid, or any of them, or any part thereof, and the reversion and reversions, remainder or remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said railroad companies, or either of them, of, in and to the same, and every part and parcel thereof;"

Subject, however, to the lien, if any there be, of a certain mortgage made by the Tennessee State Line Railroad Company, to the Central Trust Company of New York dated March first, one thousand eight hundred and eighty-tree.

"Also, all the property and premises mentioned and de-
319 scribed in a certain instrument of conveyance in the nature of a mortgage, made by Samuel Thomas, to the Central Trust Company of New York, dated April first, one thousand eight hundred and eighty-three, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on June 30th, 1883, in Mortgage Book K, pages 754 to 770, inclusive; and in the office of the clerk of the superior court of Bibb county, Georgia, on October 15th, 1883, Book III, at folios 75 to 101, inclusive; subject, however, to the lien, if any there be, of said last-mentioned instrument."

"Also, all the premises and property mentioned and described in a certain instrument of conveyance in the nature of a mortgage, made by Samuel Thomas to the Central Trust Company of New York, dated October 14th, one thousand eight hundred and eighty-four, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on December 9th, 1884, in Book L, page 795, &c.; subject, however, to the lien, if any there be, of said last-mentioned instrument."

"To have and to hold, all and singular, the property and
3[illegible] nises above mentioned and described, and hereby con-
[illegible] or intended so to be, unto the said parties of the sec-
[illegible]urchasing trustees as aforesaid, their heirs and assigns,
[illegible]roper use, benefit and behoof forever."

[illegible]ever, to the condition following, which is a part of
[illegible] of said purchase, and in addition to the sum so
[illegible] aforesaid; that is to say, that the said parties of
[illegible]r heirs, and assigns assume and pay off and
[illegible]l debts, claims and demands of whatsoever

[illegible] Supreme Court of the State of Georgia for the purposes

nature, now pending and undetermined in either of the courts in which the said original and ancillary suits are pending, which may be allowed and adjudged by the said circuit court of the United States for the eastern district of Tennessee, as prior to any right secured under the consolidated first mortgage mentioned in said judgment or decree, and subject likewise to all debts, claims and demands of whatsoever nature, incurred by Henry Fink, as receiver, in said suits, and which may remain unpaid at the termination of said Fink's receivership."

321 In witness whereof, the said party of the first part special master as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

WM. RULE, [SEAL.]
Special Master.

Signed, sealed, and delivered in the presence of—

On page 5, lines 8, 26, 27, 28, and 29, interlineations and alterations made—

HENRY B. TOMPKINS.
E. J. SANFORD.
WM. M. BAXTER.

STATE OF TENNESSEE, }
Knox County. }

Personally before me, Charles T. Champion, a notary public in and for the county and State aforesaid, came Wm. Rule, the bargainor in the foregoing instrument, with whom I am personally acquainted, who acknowledged that he executed the same for the purposes therein expressed.

Witness my hand and official seal, at Knoxville, Tennessee, this 26th day of June, 1886.

CHARLES T. CHAMPION,
Notary Public. [SEAL.]

322 *Certificate of Incorporation..*

Know all men by these presents that the undersigned (being the board of directors of the East Tennessee, Virginia and Georgia Railway Company this day elected by the purchasers of the railroad property and franchises of the East Tennessee, Virginia and Georgia Railroad Company at the judicial sale thereof on May 25th, 1886, under the decree of the United States circuit court for the eastern district of Tennessee, in the case of The Central Trust Company of New York against The East Tennessee, Virginia and Georgia Railroad Company *et al.*) assembled at Knoxville, Tennessee, on this 30th day of June, 1886, and elected a president and other officers, adopted by-laws for the government of the company, and fixed the amount of capital stock and bonds of said company, in pursuance of the statutes of Tennessee, entitled "An act as to the sale of railroads under mortgage, granting certain powers to purchasers and author-

of, or designed for use, in connection with, or for the operation, maintenance, or reparation of the said line of railroad, or any part thereof, or the equipment or appurtenances thereof, and, all and singular, the rights, privileges and franchises which the said last-mentioned company at any time held, possessed or was entitled unto; and, also, all the privileges and fran-
318 chises which the said last-mentioned company at any time held, acquired, or became possessed of or entitled unto, for, or in respect of, or for the uses or purposes of said line of railroad, or for the operation or maintenance of the same, or any part thereof; and, also, all the tolls and income of the said line of railroad, together with, all and singular, the tenements, hereditaments and appurtenances of the premises aforesaid, or any of them, or any part thereof, and the reversion and reversions, remainder or remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said railroad companies, or either of them, of, in and to the same, and every part and parcel thereof;"

Subject, however, to the lien, if any there be, of a certain mortgage made by the Tennessee State Line Railroad Company, to the Central Trust Company of New York dated March first, one thousand eight hundred and eighty-tree.

"Also, all the property and premises mentioned and de-
319 scribed in a certain instrument of conveyance in the nature of a mortgage, made by Samuel Thomas, to the Central Trust Company of New York, dated April first, one thousand eight hundred and eighty-three, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on June 30th, 1883, in Mortgage Book K, pages 754 to 770, inclusive; and in the office of the clerk of the superior court of Bibb county, Georgia, on October 15th, 1883, Book III, at folios 75 to 101, inclusive; subject, however, to the lien, if any there be, of said last-mentioned instrument."

"Also, all the premises and property mentioned and described in a certain instrument of conveyance in the nature of a mortgage, made by Samuel Thomas to the Central Trust Company of New York, dated October 14th, one thousand eight hundred and eighty-four, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on December 9th, 1884, in Book L, page 795, &c.; subject, however, to the lien, if any there be, of said last-mentioned instrument."

"To have and to hold, all and singular, the property and
320 premises above mentioned and described, and hereby conveyed or intended so to be, unto the said parties of the second part as purchasing trustees as aforesaid, their heirs and assigns, for their only proper use, benefit and behoof forever."

"Subject, however, to the condition following, which is a part of the consideration of said purchase, and in addition to the sum so bidden and paid as aforesaid; that is to say, that the said parties of the second part, their heirs, and assigns assume and pay off and discharge any and all debts, claims and demands of whatsoever

nature, now pending and undetermined in either of the courts in which the said original and ancillary suits are pending, which may be allowed and adjudged by the said circuit court of the United States for the eastern district of Tennessee, as prior to any right secured under the consolidated first mortgage mentioned in said judgment or decree, and subject likewise to all debts, claims and demands of whatsoever nature, incurred by Henry Fink, as receiver, in said suits, and which may remain unpaid at the termination of said Fink's receivership."

321 In witness whereof, the said party of the first part special master as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

WM. RULE, [SEAL.]
Special Master.

Signed, sealed, and delivered in the presence of—

On page 5, lines 8, 26, 27, 28, and 29, interlineations and alterations made—

HENRY B. TOMPKINS.
E. J. SANFORD.
WM. M. BAXTER.

STATE OF TENNESSEE, }
Knox County. }

Personally before me, Charles T. Champion, a notary public in and for the county and State aforesaid, came Wm. Rule, the bargainor in the foregoing instrument, with whom I am personally acquainted, who acknowledged that he executed the same for the purposes therein expressed.

Witness my hand and official seal, at Knoxville, Tennessee, this 26th day of June, 1886.

CHARLES T. CHAMPION,
Notary Public. [SEAL.]

322 *Certificate of Incorporation.*

Know all men by these presents that the undersigned (being the board of directors of the East Tennessee, Virginia and Georgia Railway Company this day elected by the purchasers of the railroad property and franchises of the East Tennessee, Virginia and Georgia Railroad Company at the judicial sale thereof on May 25th, 1886, under the decree of the United States circuit court for the eastern district of Tennessee, in the case of The Central Trust Company of New York against The East Tennessee, Virginia and Georgia Railroad Company *et al.*) assembled at Knoxville, Tennessee, on this 30th day of June, 1886, and elected a president and other officers, adopted by-laws for the government of the company, and fixed the amount of capital stock and bonds of said company, in pursuance of the statutes of Tennessee, entitled "An act as to the sale of railroads under mortgage, granting certain powers to purchasers and author-

izing incorporation of purchasers," passed March 12th, 1877,
323 and approved March 16th, 1877, and do hereby certify as follows, to wit:

First. That the name of said corporation is "East Tennessee, Virginia and Georgia Railway Company."

Second. The amount of the capital stock of said corporation is $57,000,000, divided in 570,000 shares of $100 each, $11,000,000 or 110,000 shares of which are first-preferred stock entitled to a five per cent. non-cumulative dividend per annum before any dividend are paid upon the second-preferred or common stock of the company, and having the exclusive right to elect eight members of the board of directors of said company during the years 1887, 1888, 1889, and 1890, and the remaining seven directors to be elected during said years by all the common and preferred stock of said company, unless before the annual meeting of the stockholders in the year 1890 said railway company shall pay out of its net earnings for two successive years full five per cent. dividends on said first-preferred stock, in which event the right of such first-preferred stock to elect eight members of the board of directors of said railway company shall cease and determine, and thereafter and in
324 any event after the *the* year 1890 the entire board of directors of said railroad company shall be elected by the stockholders, preferred and common;

$18,500,000 or 185,000 shares of which are second preferred stock, entitled to a five per cent. non-cumulative dividend per annum before the payment of any dividends on the common stock of the company, and $27,500,000 or 275,000 shares of which are common stock.

Third. The number of the board of directors of said corporation is fifteen, and the names and residences of the first board, which shall hold its office until its successor is elected at the annual meeting of the stockholders in the year 1887, are as follows, to wit:

Charles M. McGhee, Knoxville, Tenn.
Edward J. Sanford, " "
Henry Fink, " "
O. H. P. Rogan, " "
James G. Mitchell, " "
Robert H. Campbell, " "
Robert H. Richards, Atlanta, Ga.
Jay O. Moss, Sandusky, Ohio.
Samuel Thomas, New York city.
C. S. Brice, " "
Samuel Shethar, " "
Geo. Warren Smith, New York city.
325 Jno. G. Moore, " "
O. H. Payne, " "
Wm. M. Baxter, Knoxville, Tenn.

Fourth. That the railroad of said corporation lies in the States of Tennessee, Georgia, Alabama, and Mississippi, beginning at Bristol, on the line between the State of Tennessee and the State of Virginia and running thence via Knoxville and Cleveland to Chattanooga, in the State of Tennessee, and from Cleveland, in said State,

via Dalton, Rome, Atlanta, and Macon to the city of Brunswick, in the State of Georgia, and running from Rome, Georgia, via Colera and Selma to Meridian, Mississippi, and including a cut-off from Ooltewah, Tennessee, to Red Clay, Georgia, and also including a branch from Morristown to Paint Rock, Tennessee, and also including a branch from Cochran to Hawkinsville, Georgia.

Fifth. That said road has heretofore been known under the name of "East Tennessee, Virginia and Georgia Railroad Company," which was formed from the consolidation of the prior existing East Tennessee, Virginia and East Tennessee and Georgia Rail-
326 road Company, of the State of Tennessee, the East Tennessee, Virginia and Georgia Railroad Company having, subsequent to its consolidation, acquired, by purchase, the railroads and franchises of the Georgia Southern Railroad Company, the Macon and Brunswick — Company, and the Cincinnati and Georgia Railroad Company, corporations of the State of Georgia; and the Selma, Rome and Dalton Railroad Company, the Alabama Central Railroad Company, corporations of the State of Alabama; and the Tennessee State Line Railroad Company, a corporation of the States of Tennessee and Georgia, the property and franchises of all of which companies have become vested in the corporation whose formation is hereby certified.

In witness whereof the president of said East Tennessee, Virginia and Georgia Railway Company and the members of its board of directors have signed this certificate this thirtieth day of June, A. D. 1886.

C. M. McGHEE.
E. J. SANFORD.
HENRY FINK.
O. H. P. ROGAN.
JAMES G. MITCHELL.
R. H. CAMPBELL.
R. H. RICHARDS.
JAY O. MOSS.
CALVIN S. BRICE.
SAMUEL SHETHAR.
GEO. WARREN SMITH.
JOHN G. MOORE.
O. H. PAYNE.
WM. M. BAXTER.
SAMUEL THOMAS, *President.*

327 STATE OF TENNESSEE, *Knox County,* } ss:

Personally before me, J. N. Mitchell, a notary public in and for the State and county aforesaid, came C. M. McGhee, E. J. Sanford, Henry Fink, O. H. P. Rogan, James G. Mitchell, R. H. Campbell, R. H. Richards, Jay O. Moss, C. S. Brice, Samuel Shethar, Geo. Warren Smith, John G. Moore, O. H. Payne, Wm. M. Baxter, and Samuel Thomas, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument as their act and

deed and for the purposes therein expressed and in order to comply with the provisions of law touching incorporations, &c.

Witness my hand and official seal, at Knoxville, Tennessee, this June 30th, 1886.

J. N. MITCHELL, [SEAL.]
Notary Public.

I, John Allison, secretary of state of the State of Tennessee, do certify that the foregoing instrument, with certificates of acknowledgement, of probate, and registration, was filed in my
328 office for registration on the 1st day of July, 1886, in Corporation Record Book K, in said office, page 529 *et seq.*

In testimony whereof I have hereunto subscribed my official signature and by order of the governor affixed the great seal of the State of Tennessee, at the department, in the city of Nashville, this 1st day of July, A. D. 1886.

JOHN ALLISON,
[SEAL.] *Secretary of State.*

Deed to East Tenn., Va. & Ga. Railway Co.

This indenture, made this first day of July, in the year one thousand eight hundred and eighty-six, between Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappen, George Warren Smith, and Edmund W. Corlies, of the first part, and the East Tennessee, Virginia and Georgia Railway Company, a corporation created by and organized under the laws of the State of Tennessee, of the second part;

Whereas the mortgage upon the railroad and property of the East Tennessee, Virginia and Georgia Railroad Company,
329 known as the consolidated first mortgage of said East Tennessee, Virginia and Georgia Railroad Company, has been foreclosed in the circuit court of the United States for the eastern district of Tennessee, by sale under said mortgages and in pursuance of the judgments or decrees of said courts, and of the judgments or decrees of the circuit courts of the United States for the northern district of Georgia, the southern district of Georgia, the northern district of Alabama, the middle district of Alabama, and the southern district of Mississippi, adopting and confirming the same; and

Whereas, at such sale, the said parties of the first part, became and were the purchasers of said railroad and property, as purchasing trustees, and thereby became and were entitled to and invested with all and singular the franchises and property mentioned and described in said judgments and decrees, with all the rights, privileges and immunities appertaining thereto; and

Whereas the said railroad and property, rights, privileges and immunities have been duly conveyed to said parties of the first

part, by William Rule, special master, by a deed of convey-
330 ance bearing date the twenty-eighth day of June, 1886, made in pursuance of such sale and of the order of said circuit court, and

Whereas, the said parties of the first part have heretofore been put in possession of said property; and

Whereas, after being put in possession of said property, said parties of the first part, purchasers as aforesaid, did meet together at Knoxville, in the State of Tennessee, and did adopt a name for the company or corporation, to wit, the East Tennessee, Virginia and Georgia Railway Company, to operate said railroad, and did elect a board of directors in pursuance of the statute in such cases made and provided; and

Whereas the said board of directors did thereupon make and file with the secretary of state of the said State of Tennessee, the certificate required by law, signed by the president and members of such board; and

Whereas, by the several proceedings aforesaid, had in pursuance of the statutes of the said State of Tennessee, the said party of the second part hath become, and now is, a body corporate under the name so adopted, with all the rights, powers, privileges, im-
331 munities, and franchises possessed by the East Tennessee, Virginia and Georgia Railroad Company:

Now this indenture witnesseth, that the said parties of the first part, in order to carry into effect the proceedings aforesaid, and in consideration of the premises, and of the sum of ten dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell and convey, unto the said party of the second part, all and singular the railroad, property, rights, privileges, immunities, and franchises of every nature whatsoever, purchased by said parties of the first part at the sale aforesaid, and conveyed by the said deed of conveyance made by said William Rule, special master, to said parties of the first part, bearing date the twenty-eighth day of June, 1886, and described in said deed, as follows, viz:

All the right, title, and equity of redemption of the East Tennessee, Virginia, and Georgia Railroad Company, or of Henry Fink, receiver, or of any of the parties to said cause, in and to
332 "all and singular the estate and property, real, personal and mixed, and all fixtures, rights, privileges, immunities, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants and contracts of all and every kind, at any time held and owned or occupied by or belonging to the East Tennessee, Virginia and Georgia Railroad Company, including all and singular its lines of railroad from and including the terminus and depot at Bristol, in the county of Sullivan, State of Tennessee, and thence two hundred and forty-two miles, more or less, via Knoxville, to the city of Chattanooga, in the county of Hamilton, in said State of Tennessee, and including the line of railroad of said East Tennessee, Virginia and Georgia Railroad Company, from Cleveland,

in the county of Bradley, in said State of Tennessee, thirty miles, more or less, to Dalton, in the county of Whitfield, in the State of Georgia, and including the branch line from Ooltewah, in the county of James, in the State of Tennessee, to Red Clay, in the county of Whitfield, in the State of Georgia, twelve miles, more or less; and also including the line of railroad of the East Tennessee, Virginia and Georgia Railroad Company, commencing in the city of
333 Selma, in the county of Dallas, in the State of Alabama, and extending thence in a northeasterly direction, continuously, through the counties of Dallas, Autauga, Perry, Bibb, Shelby, Talladega, Calhoun and Cherokee, in said State of Alabama, one hundred and seventy-two miles, more or less, to the line of the State of Georgia, through the county of Floyd, by way of Rome, in the last-named county, and also through the counties of Gordon and Whitfield, to the town of Dalton, in the last-named county and State, sixty-five miles more or less, and then terminating at the point or points of connection with the Western and Atlantic railroad, and with the other lines of railroad of the said railroad company hereinbefore referred to; and also including the line of railroad of said railroad company, extending from Morristown, in the State of Tennessee, to Paint Rock, at or near the State line between the States of Tennessee and North Carolina, forty-five miles, more or less; and also including the line of railroad of the railroad company, from Rome, in the county of Floyd, by way of Atlanta and Macon to Brunswick, in the county of Glynn, and from Cochran to Hawkinsville, both in the county of Pulaski; all in the State of Georgia, three
334 hundred and seventy-eight miles, more or less; and also including the line of railroad of said railroad company, from Selma, in the county of Dallas, in the State of Alabama, by way of Lauderdale, to Meridian in the county of Lauderdale, in the State of Mississippi, one hundred and thirteen miles, more or less; and being in all one thousand one hundred and twenty-three miles, more or less, and also, all and singular, the lands, roadways, tracks, superstructures, rails laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds and lands, procured, provided or intended for use for that purpose, lands used or procured or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements and privileges, at any time belonging or appertaining to, or used or procured or designed to be used, for the purpose of or in connection with the said line of railroad, or the maintenance and operation thereof, or of any
335 part thereof; and also, all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all other rolling stock and equipment, and all machinery, tools, and implements, rails, chairs and spikes, and other materials, at any time owned or possessed by the said railroad company or by Henry Fink, receiver thereof, for the uses or purposes of, or designed for

use in connection with, or for the operation, maintenance or reparation of the said lines of railroad, or any part thereof, or the equipment or the appurtenances thereof; and also, all and singular, the rights, privileges and franchises, which the said railroad company or Henry Fink, receiver thereof, at any time held, possessed or was entitled unto; and also all the rights, privileges, and franchises, which the said railroad company at any time acquired or became possessed of, or entitled unto, for or in respect of, or for the uses or purposes of the said lines of railroad, or the operation or maintenance of the same or any part thereof; and also all the tolls and income of the said lines of railroad, together with all and singular the tenements, hereditaments and appurtenances of the premises or any of them, or any part thereof, and the reversion and reversions,
336 remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said East Tennessee, Virginia and Georgia Railroad Company, and Henry Fink, its receiver, of, in and to the same and every part and parcel thereof."

"Also, all the right, title and interest of the said East Tennessee, Virginia and Georgia Railroad Company, as well as of the Central Trust Company of New York, of in and to two million four hundred thousand dollars ($2,400,000) of the capital stock of the Memphis and Charleston Railroad Company, and all the shares owned by the East Tennessee, Virginia and Georgia Railroad Company, or held in trust for said company, by C. H. R. Lyman, or others, of the capital stock of the Knoxville and Ohio Railroad Company, and two hundred thousand dollars ($200,000), par value of the Cincinnati and Georgia Division bonds of the East Tennessee, Virginia and Georgia Railroad Company, heretofore deposited with said Central Trust Company of New York, pursuant to the terms and provisions of a judgment or decree of the circuit court of the United States for the eastern district of Tennessee, in a suit
337 of the Mayor and Aldermen of Knoxville against the Knoxville and Ohio Railroad Company, and others."

Also, all the right, title and equity of redemption of the East Tennessee, Virginia and Georgia Railroad Company, and the Tennessee State Line Railroad Company, and of Samuel Thomas, and of said receiver, or any or either of them, or of any of the parties to said cause, in and to, "all and singular, the estate and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, rights and leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind, held and owned, or occupied by, or belonging to the East Tennessee, Virginia and Georgia Railroad Company, and the Tennessee State Line railroad, including all and singular, the lines of railroad of the said Tennessee State Line Railroad Company, from and including the terminus and depot at Ooltewah, in the county of James, in the State of Tennessee, and thence to, or near to Red Clay, in the county of Whitfield, in the State of Georgia; and, also,

All and singular the lands, roadways, tracks, superstructures,

rails laid or to be laid, sidings, turnouts, bridges, piers,
338 wharves, viaducts, culverts, walls, fences, ways, and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, depot grounds, and lands procured, provided or intended for use for that purpose, lands used or procured for sidings, buildings, structures, erections, improvements, leases, and leasehold interests, contracts, choses in actions, easements, and privileges used or procured, or designed to be used for the purpose of, or in connection with said line of railroad, or the maintenance or operation of the same or any part thereof; and, also, all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all other rolling stock, or equipment, and all machinery, tools and implements, rails, chairs, and spikes, and other materials whatever, at any time owned or possessed by the said Tennessee State Line Railroad Company, or its successors, for the uses or purposes of, or designed for use, in connection with, or for the operation, maintenance, or reparation of the said line of railroad, or any part thereof, or the equipment or appurtenances thereof; and, also, all and singular, the rights, privileges and franchises which the said last-mentioned company at any time held, possessed or was en-
339 titled unto, and also all the privileges and franchises which the said last-mentioned company acquired, or became possessed of or entitled unto, for or in respect of, or for the uses or purposes of said line of railroad, or the operation or maintenance of the same, or any part thereof; and, also, all the tolls and income of the said line of railroad, together with, all and singular, the tenements, hereditaments and appurtenances of the premises aforesaid, or any of them, or any part thereof, and the reversion and reversions, remainder or remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said railroad companies, or either of them, of, in and to the same, and every part and parcel thereof;" "subject, however, to the lien, if any there be, of a certain mortgage made by the Tennessee State Line Railroad Company, to the Central Trust Company of New York, dated March first, one thousand eight hundred and eighty-three." "Also all the property and premises mentioned and described in a certain instrument of conveyance in the nature of a mortgage made by Samuel Thomas, to the Central Trust Company of New York,
340 dated April first, one thousand eight hundred and eighty-three, and recorded in the office of the clerk of the superior court of Fulton county, Georgia, on June 30th, 1883, in Mortgage Book K, pages 754 to 770, inclusive; and in the office of the clerk of the superior court of Bibb county, Georgia, on October 15th, 1883, Book III, at folios 75 to 101, inclusive; subject, however, to the lien, if any there be, of said last-mentioned instrument." "Also, all the premises and property mentioned and described in a certain instrument of conveyance in the nature of a mortgage, made by Samuel Thomas to the Central Trust Company of New York, dated October 14, one thousand eight hundred and eighty-four, and re-

corded in the office of the clerk of the superior court of Fulton county, Georgia, on December 9th, 1884, in Book L, page 795, &c.; subject, however, to the lien, if any there be, of said last-mentioned instrument. To have and to hold, all and singular, the property and premises above mentioned and described, and hereby conveyed or intended so to be, unto the said party of the second part, its successors and assigns, to its and their only proper use, benefit and behoof forever."

341 "Subject, however, to the condition, following, which is a part of the consideration of said purchase, to wit: that the said party of the second part, for itself and its successors, and assigns, hereby assumes and agrees to pay off and discharge any and all debts, claims and demands of whatsoever nature, now pending and undetermined in either of the courts, in which are pending the original and ancillary suits of The Central Trust Company of New York, complainant, against The East Tennessee, Virginia and Georgia Railroad Company and others, defendants, which may be allowed and adjudged by the said circuit court of the United States for the eastern district of Tennessee, to be prior to any right secured under the consolidated first mortgage mentioned in the judgment or decree of said court; and subject likewise to all debts, claims and demands of whatsoever nature, incurred by Henry Fink, as receiver in said suits, and which may remain unpaid at the termination of said Fink's receivership."

And the said party of the second part, for itself, its successors and assigns, doth hereby covenant and agree to and with said
342 parties of the first part and each of them, their and each of their heirs, executors, administrators, and assigns, to hold and save harmless the said parties of the first part, and each of them, their and each of their heirs, executors, administrators and assigns, of and from any and all of said debts, claims and demands, and from any and all liability or responsibility thereof or in any manner arising out of the same.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

F. P. OLCOTT. [SEAL.]
F. D. TAPPEN. [SEAL.]
E. W. CORLIES. [SEAL.]
GEO. WARREN SMITH. [SEAL.]
C. M. McGHEE. [SEAL.]

Interlineations and alterations on pages 5, lines 5 and 31; 6, line 1; 10, line 15; 13, line 22; 16, lines 20 and 30, made before signing and acknowledgement.

J. N. MITCHELL, *N. P.* [L. S.]

STATE OF TENNESSEE, *Knox County,* } *ss:*

Personally appeared before me, J. N. Mitchell, notary public for the county and State aforesaid, *came* F. P. Olcott, F. D. Tappen,

E. W. Corlies, Geo. Warren Smith, and C. M. McGhee, the
343 bargainors in the foregoing deed, with whom I am personally acquainted, who acknowledged that they executed the same for the purposes therein expressed.

Witness my hand and official seal, at Knoxville, Tennessee, this 1st day of July, 1886.

J. N. MITCHELL,
Notary Public. [L. S.]

Incorporation of East Tennessee, Virginia and Georgia Railway Company under Laws of Tennessee.

Incorporation act.

An act as to the sale of railroads under mortgage, granting certain powers to purchasers, and authorizing incorporation of purchasers.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the purchasers of any railroad chartered by this State, which is sold under any mortgage heretofore or hereafter executed by it, who shall be, under said sale, put in possession of said railroad by any court of competent jurisdiction, shall have the same rights to operate the same in this State as the incorporated company which executed said mortgage had by the laws of the State.

344 SEC. 2. Be it further enacted, That in case of any railroad company chartered by this State or other State, and whose road lies in part or in whole of this State, which has heretofore mortgaged its franchises, road-beds, superstructures, and property of every description, as provided or allowed in the acts of this State (Acts of 1870–1871, chapter 116, passed February 2d, 1871) or other law or laws and said mortgage shall afterwards be foreclosed in any court in this or of the United States having jurisdiction thereof, by sale under said mortgage, then and in that case, the purchasers at said sale shall, by virtue thereof, be entitled to and be invested with the said franchises and property, and with all the rights, privileges and immunities appertaining thereto by the laws of this State in the act of incorporation of said company, and the amendments thereto, and the general internal improvement law, or other laws of this State, in as full a manner as the said company or companies are or were; provided, that nothing herein contained shall be so construed as to exempt said railroad and its property from liability to State, county, and municipal taxation; and
345 provided further, that the purchasers waive any right of exemption from taxation, if any existed in the original charter, or other law of this State, in favor of such railroad property, or stock therein.

SEC. 3. Be it further enacted, That the purchasers of such railroad, its property and franchises, may, after being put in possession of said property under such sale, meet together, adopt a name for the company or corporation to operate said railroad, and elect a board of directors of such members as they may see fit, not less than three,

at least one of whom shall reside in this State, and in such meeting of said purchasers every person interested in the said purchase shall be entitled to one vote for every $100.00 of such interest, unless the number of votes to which each party shall be entitled, and the mode of representing the interest of the purchasers shall have been previously agreed upon among the parties interested in said purchase; and the said board of directors shall proceed to elect a president, and such other officers as may be expedient for the proper management of said property, fix their compensation and duties, and adopt by-laws for the government of said
346 company, not inconsistent with the laws of this State, and shall fix the amount of the capital stock of said company, and the amount of stocks or bonds, or both, which shall represent the interest of said purchasers, dividing such stock into shares of $100 each. The said board of directors shall make a certificate showing the name of the corporation, the amount of its capital stock, the shares into which the same is divided, the number and residences of the board of directors, where the road lies, and the name or names by which it has heretofore been chartered and known, and shall cause the same to be signed by the president and members of such board, and to be filed with the secretary of state of this State; and thereupon the said purchasers shall be a body corporate, under the name so adopted, with all the rights, powers, privileges, immunities, and franchises, possessed under the laws of this State by the company or companies whose road and franchises were sold as aforesaid, under the acts of incorporation thereof, or any amendments thereto, any subsequent act or acts of this State, and with all the rights, powers, privileges, and franchises possessed by the corporation formed and or-
347 ganized for the building of railroads under act 1, chapter 4, title 9, or other provisions of the code of this State. And said board of directors shall issue to the parties interested in the purchase of said railroad, shares of the capital stock thereof, of $100 each, to such amounts as they shall determine, in proportion to their rights and interests in the property, which shares shall be fully paid and not liable to calls, and also such bonds and obligations as they may determine: Provided, that no railroad company or corporation shall have the power under this act, or any other law of this State, to create a mortgage or other kind of lien on its property in this State which shall be valid and binding against judgments or decrees, and executions therefrom, for timbers furnished or work and labor done on its road, or for damages done to persons and property in the operation of its road in this State: And provided further, that this State shall have such powers over the operations of all railroads in this State as to prevent, by appropriate legislation, unjust discrimination against and extortion for freight and passage over such railroads.

SEC. 4. Be it further enacted, That nothing in this act contained shall be so construed, as to interfere in any manner with
348 valid prior mortgage liens, if any, upon the property, rights, franchises, and privileges of the company, whose road may

be sold as aforesaid, nor in any way to impair, modify, or diminish the right of priority of any lien this State may have on the property so sold.

SEC. 5. Be it further enacted, That nothing herein contained shall be construed as giving to the purchaser of any road any rights, immunities or privileges that had been forfeited previous to the purchase, whether said forfeitures had been declared or not, nor to give, nor shall anything herein contained be construed to give to said roads any claim against the State of Tennessee under the internal-improvement laws, nor shall they have any exemption from taxation, by the State of Tennessee, or any counties or municipalities through which said roads may pass, which were granted under the original charters of the railroads purchased, or other laws of this State.

SEC. 6. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 12th 1877.

EDWIN T. TOLIAFERRO,
Speaker of the House of Representatives.
HUGH M. McADOO,
Speaker of the Senate.

Approved March 16th, 1877.

JAS. D. PORTER, *Governor.*

(See act of Tennessee, 1877, chap. 12, pp. 17–20.)

349 *General Replication.*

In the Circuit Court of the United States, Southern District of Georgia, Eastern Division.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*, Defendants.

The replication of George A. Cunningham, complainant, to the answer of The East Tennessee, Virginia and Georgia Railway Company, defendant.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

350 All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

W. W. MONTGOMERY,
CHAS. N. WEST,
Complainant's Solicitors.

Endorsement: In the circuit court of the United States, southern district of Georgia. George A. Cunningham, complainant, and The East Tennessee, Virginia and Georgia Railroad Company *et al.*, defendants. General replication. Filed Aug. 1st, 1887. Marion Erwin, dep. cl'k. Montgomery, West.

351 *Order Extending Time for Taking Testimony.*

In the Circuit Court of the United States.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*, Def'ts.

On motion of the complainants and by consent of The East Tennessee, Virginia and Georgia Railway Company, defendant, it is ordered that the time for taking testimony in this cause be extended for three months.

In open court.

EMORY SPEER, *Judge.*

Endorsement: Circuit court of the United States, eastern division, southern district of Georgia, November term, 1887. Geo. A. Cunningham *vs.* Macon & Brunswick R. R. Co. *et al.* Order extending time for taking testimony. Filed Nov. 10th, 1887. S. F. B. Gillespie, deputy clerk.

352 *Order Extending Time for Taking Testimony.*

In 5th Circuit Court of the United States, Eastern Division, Southern District of Ga.

GEORGE A. CUNNINGHAM, Compl't,
and
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Def'ts. } In Equity.

Upon motion of complainant's solicitors and by consent of counsel, it is ordered that the time for taking testimony in above cause be, and the same is hereby, extended for the term of three months from the date of this order.

In open court.

Aug. 11th, 1888.

EMORY SPEER,
U. S. Judge.

Endorsement: In 5th circuit court of the United States, eastern division, so. dist. of Georgia. Geo. A. Cunningham *et al.*, comp'ts, and The Macon and Brunswick R. R'd Co. *et al.*, def'ts. Order extending time for taking testimony. Filed August 11th, 1888. S. F. B. Gillespie, dep. cl'k.

And afterwards, to wit, on the 6th day of February, 1890, the following proceedings were had:

353 *Petition for Extension of Time for Taking Testimony.*

In the United States Circuit Court, Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Def'ts. } In Equity.

The petition of The East Tennessee, Virginia & Georgia Railway Company, a defendant in the above-stated case, respectfully showeth that up to the 13th day of November, 1889, it was contemplated by the solicitors for the complainant and the solicitors for this defendant that the testimony to be submitted by the respective parties would be agreed upon in such manner that it would not be necessary to examine witnesses; that on the date last named the solicitors for this defendant were advised by the solicitors for the complainant that after the expiration of that day they would decline to enter into the contemplated agreement concerning testimony in the said case; that no agreement was made on that date concerning said testimony in the said case;
354 that after the cause was at issue the complainant prepared interrogatories for certain witnesses, which were crossed by this defendant, and commissions were issued thereon; that these interrogatories have not been returned to court, and so far as this defendant knows and believes the witnesses were not examined; that the notice given to this defendant's solicitors on the 13th day of November, referred to above, was a matter of great surprise to this defendant and its solicitors, as it had supposed all along that the agreement referred to would be made, and, in fact, had that assurance from the counsel for complainant, and that the only reason why the agreement was not made and formally closed and reduced to writing on said 13th day of November, 1889, was that on the said last-named date this defendant's solicitors were prevented by other engagements from attending to the matter; that it has been impossible for this defendant since that date to take testimony which it desires to take in said cause by reason of the witnesses it desires to examine residing at long distances from Savannah and remote from each other, and as matters referred in the complainant's bill happened many years ago it will be necessary for this defendant
355 to make further investigation in order to get the names of parties who can testify to such matters.

Wherefore it prays that the time for taking its testimony in the above-stated cause shall be enlarged until the first day of April, 1890.

CHISHOLM, ERWIN & DU BIGNON,
Sol's for said Def't.

STATE OF GEORGIA,
Chatham County.

Before me personally — R. G. Erwin, who deposes and says that he is one of the solicitors for the petitioner, and that the facts set forth in the foregoing petition are true.

R. G. ERWIN.

Sworn to and subscribed before me this 6th day of February, 1890.

WILLIAM L. CLAY,
Notary Public, Chatham Co., Ga.

Notice to Complainants.

To Messrs. W. W. Montgomery & C. N. West, solicitors for George A. Cunningham.

GENTLEMEN: Please take notice that we will present the foregoing application and petition to the Honorable Emory Speer, U. S.
356 judge, at Macon, and ask the grant of the order indicated above on Wednesday morning next, February 12th, 1890, at ten o'clock.

CHISHOLM, ERWIN & DU BIGNON,
Sol's for E. T., Va. & Ga. R'y Co.

Acknowledgement of Service.

Due and legal service of foregoing notice, affidavit, & petition & form of order acknowledged. Copy received Feb'y 6th, 1890.

CHAS. N. WEST,
Compl'ts Sol.

Order for Hearing.

Ordered that the foregoing application be heard at Macon, Monday, Feb'y 17th, at 10 a. m., and that the plaintiffs be notified of such hearing.

Feb'y 13th, 1890.

EMORY SPEER, *Judge.*

Endorsement: In U. S. cir. c't, so. dist. of Ga., east. div. George A. Cunningham *vs.* The Macon & Brunswick R. R. Co. *et al.* Petition and order extending time for taking testimony. Filed February 6th, 1890. S. F. B. Gillespie, deputy clerk.

357 *Response to Rule to Show Cause Why Time to Take Testimony Should not be Enlarged.*

In the United States Circuit Court, Southern District of Georgia, Eastern Division.

GEO. A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK RAILROAD *et al.*, Defendants.

The complainant, for cause why the time for taking testimony should not be further enlarged, shews—

That the supplemental bill making The East Tenn., Va. & Ga. R'w'y Co. a defendant in the above cause was filed in this court on December 30th, 1886, as appears of record; that at February rules, 1887, the said defendant entered its appearance, and that on March 5th complainant consented to an extension of time to said defendant to demur, plead, or answer, as appears of record.

That by similar consents of the complainant the time of the said defendant to demur, plead, or answer was extended at April, May, June, and July rules, 1887, and that defendant answered at August rules, 1887, all of which appears of record; that the time for
358 taking testimony expired at December rules, 1887, and was extended by consent, and that by similar consents it was extended to the 11th day of November, 1888, as appears of record; that on the 4th day of December, 1888, on the application of the complainant for an extension of time for taking testimony for three months longer, the said court refused any further extension in the cause beyond thirty days, and notified all counsel that the case must be tried at the end of said time; that on the same day the complainant's solicitor handed to the defendant's solicitors interrogatories referred to by the defendant, to be crossed, for two witnesses; that on the 18th day of December, 1888, and while these interrogatories were still uncrossed the counsel for the respective parties came to an understanding as to the admission in evidence of certain portions of testimony already in the custody of the court, having been taken formerly in the case of Alton Augier *vs.* The Macon & Brunswick R. R. *et al.*, and the solicitor for the defendant undertook to prepare an agreement which should definitely name the portions; that while the complainant awaited this agreement he proceeded to have commissions issued to take the testimony of said two witnesses, which were issued on January 11th, 1889, but have never been executed and returned, and are now con-
359 sidered unnecessary in the cause; that thereafter the complainant awaited, but never ceased to press for the formulation of the agreement to admit, or else to try the cause in accordance with the notification of the court until the 13th day of November last, when the following notice was given, which speaks for itself:

SAVANNAH, *Nov.* 13*th*, 1889.

Mess. Chisholm & Erwin, city.

GENTLEMAN: You will remember that we have now been for many months at your service in regard to the execution of an agreement to admit in evidence in the case of Geo. A. Cunningham *vs.* The Macon & Brunswick R. R. Co. *et al.* certain testimony taken formerly in the case of Alton Augier against the former owners of the Macon & Brunswick R. R.

We now find ourselves no nearer to the consummation of our intention than we were early in the year, and are approaching the trial of the case without definite knowledge of what you wish in evidence; our client is not content to remain longer in this state of uncertainty, and we therefore beg to advise you that after the expiration of today we will decline to enter into the contemplated agreement.

360 Yours, very truly, W. W. MONTGOMERY,
C. N. WEST,
Compl't's Solicitors.

To which the following reply was received:

SAVANNAH, GA., *Nov.* 13*th*, 1889.

Mess. W. W. Montgomery & C. N. West, city.

GENTLEMEN: We have today your favor in which you advise us that after the expiration of today you will decline to enter into the contemplated agreement concerning testimony in the case of Cunningham *vs.* The M. & B. R. R. Co.

We have today been engaged in matters which have taken all of our time and it has been impossible to give any attention to the matter to which your favor refers. We can only say that the notice you give us is rather short, but if you have no disposition to make the agreement referred to that ends the matter.

Yours very truly, CHISHOLM & ERWIN.

That said notice was given and served on the morning of that day, but no agreement was tendered, although the cause had been duly set for trial by the court, and that now three months
361 more have expired since said notice was given and no action has been taken by the defendant.

And the complainant says that at no time was any agreement made or contemplated "that the testimony to be submitted by the respective parties would be agreed upon in such manner that it would not be necessary to examine witnesses," if indeed any such matter of fact is material after a long tender and waiting by the complainant for whatever was agreed upon, and that the matter of agreement was as is hereinbefore stated, and that the counsel for defendant is in unintentional error in ascribing to it a different effect.

And complainant says that the record discloses the greatest professional indulgence and accord upon the part of his solicitors, and that after extension of time has been refused him and parties have

announced ready, and after he has waited many months upon an agreement undertaken to be prepared for mutual assent by the defendant, but never prepared or its terms settled, and after notice formally given for the purpose of complying with the notification of trial by the court, and after further delay of three months in taking
362 testimony the defendant is not entitled to a further extension.

W. W. MONTGOMERY,
C. N. WEST, *Compl't's Sols.*

STATE OF GEORGIA,
Chatham County.

Personally appeared Charles N. West, who deposes and says that he is one of the complainant's solicitors, and that the facts stated in the foregoing answer are true.

CHAS. N. WEST.

Sworn to & subscribed before me this 17th day of February, 1890.

W. P. LA ROCHE,
Not. Pub., Chatham Co., Ga.

Endorsement: U. S. C. c't, so. dist. of Ga., eastern division. Geo. A. Cunningham, compl't, & The Macon & Brunswick R. R. Co. *et al.* Response to rule to show cause why time to take testimony should not be enlarged. Filed in clerk's office Feb'y 25th, 1890. Cecil Morgan, deputy clerk. Montgomery — West.)

363 *Order Enlarging Time to Take Testimony.*

In U. S. Circuit Court, East. Div., So. Dist. Ga.

GEORGE A. CUNNINGHAM, Complainant,
vs.
THE MACON & BRUNSWICK RAILROAD CO. *et al.*

The application of the East Tennessee, Virginia and Georgia Railway Company to enlarge the time for taking testimony in the above-stated cause came on to be heard this day, when, pending the hearing and without passing on the affidavits and answer, the court announced that he would on his own motion enlarge the time for taking testimony until the rules day in April next.

Whereupon it is decreed that the time for taking testimony be, and it is, accordingly enlarged until said rules day.

EMORY SPEER, *Judge.*

In open court, Feb'y 25, 1890.

364 *Agreement of Counsel.*

In the United States Circuit Court for the Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM, Complainant,
and
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Defendants. } In Equity.

It is hereby stipulated and agreed between the undersigned counsel in the above stated cause as follows:

1. The execution of Exhibit "B" to the original bill is admitted.

2. The execution of the bonds sued on is admitted on profert of the same and no further proof of the same need be made.

3. The execution of all the exhibits attached to the answer of the East Tennessee, Virginia and Georgia Railway Company is admitted and no further proof of the same need be made.

4. The execution of the letter attached to the original bill as Exhibit F is admitted and no further proof of the same need be made.

Each party hereto reserves all right to object to the admissibility of the foregoing or either of the same on any ground except
365 that the execution of the same has not been duly proved.

Executed in duplicate in Savannah February 23d, 1888.

W. W. MONTGOMERY,
C. N. WEST, *Compl't's Sol's.*
CHISHOLM & ERWIN,
Solicitors for the East Ten., Va. & Ga. R'y Co., one of the Defendants.

Endorsement: In the U. S. circuit court, east. div., southern district of Georgia. George A. Cunningham, compl't, and The Macon & Brunswick Railroad Company, def'ts. Admission of counsel. Filed in clerk's office May 30, 1890. H. H. King, clerk.

Afterwards, on the 3rd day of June, 1890, the following proceedings were had:

Petition of J. P. Branch to be Made Party Complainant.

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia.

GEORGE A. CUNNINGHAM
versus.
THE MACON & BRUNSWICK R. R. Co. *et al.* } In Equity.

366 To the judges of the circuit court of the United States for the southern district of Georgia:

The petition of John P. Branch, a citizen of the State of Virginia, shews that the above-stated case of Cunningham *vs.* The Macon &

Brunswick Railroad Company *et al.* is a creditor's bill filed by the complainant in this honorable court as a holder of nineteen bonds of $1,000.00 each issued by said company as second-mortgage bonds upon their said railway, the whole series amounting to $600,000, secured, as the bill alleges, by a statutory mortgage upon said railroad, running from Macon to Brunswick and lying wholly within said district. The bill further alleges that all of the first-mortgage bonds have been paid and seeks to foreclose said mortgage upon the road, which is now in the hands of the East Tennessee, Virginia and Georgia railway, which became a purchaser of said road with full knowledge of the second mortgage and pending said suit. These latter facts are set forth in a supplemental bill filed by complainant on the — day of ——, 1887.

The case is fully and at large set out in the bill and ex-
367 hibits as originally filed and in the pleadings filed subsequent thereto. Leave is asked to refer to the same as often as necessary.

Your petitioner further shews that he is also a *bona fide* holder of twenty-five of the bonds of the same series, each for $1,000.00, numbered from 276 to 287, both inclusive, and from 521 to 533, both inclusive, all of which are here to the court shewn; that he became such holder for a valuable consideration after the State of Georgia (the endorser upon said bonds) had declared said second-mortgage bonds valid and before the State's subsequent repudiation of the same, as set forth in the pleadings in the above-stated case.

Your petitioner further shews that on May 10th, 1875, after said road had been seized by the State of Georgia for non-payment of its coupons as provided for in the statutory mortgage, your petitioner filed his bill in this honorable court against the Macon & Brunswick Railroad Company, E. A. Flewellen, *et al.* to enjoin said Flewellen, who had been put in possession of said road by the governor of Georgia after its seizure for the purpose of running and ultimately selling the same, from proceeding with the sale and for the appointment of a receiver and for general relief, which bill
368 was served on the Macon & Brunswick Railroad Co. June 8th, 1875, and answered by Flewellen on May 23d, 1875, in which answer he sets up a want of jurisdiction in this court, because the State was the real party holding possession of the road. An interlocutory decree was rendered May 23d, 1875, denying the injunction and receiver, and on April 13th, 1877, a final decree was had as follows:

"Equity.

JOHN P. BRANCH
vs.
THE MACON & BRUNSWICK R. R. Co. } In Equity.

The above-stated bill having been taken *pro confesso* and ordered to proceed *ex parte* at the April term, 1876, and no appearance being yet made by defendant, and complainant having submitted his proof to the court:

It is ordered, adjudged, and decreed that complainant is entitled to recover of defendant the sum of twenty-five thousand dollars, with interest from the first day of November, 1873, for which judgment is rendered in favor of complainant against defendant; and the clerk is directed upon the application of complainant or his solicitor to issue execution for said sum with costs of suit against said defendant; and it is ordered that complainant have leave to withhold from file the bonds described in his said bill for the
369 purpose of seeking payment thereof from the State of Georgia on the guarantee set forth in the bill.

In open court, April 13, 1877.

JOHN ERSKINE,
U. S. Judge."

All of which will more fully appear by reference to the record of said cause, of file in this court.

Your petitioner further shows that no execution was ever issued upon said final decree owing to the insolvency of defendant, which has continued from that day to the present time, and the further fact that all property of said defendant had been prior to said decree seized by the State of Georgia and held by it as an alleged purchaser thereof until said property passed into the hands of the East Tennessee, Virginia and Georgia Railway Company, as set forth in the supplemental bill filed by said George A. Cunningham, hereinbefore referred to, and that in the meantime and while said property was still held by said State said Cunningham filed his said bill bringing said property, should it at any time pass out of the possession of said State, under the jurisdiction and administration of this court, it could not be levied on by J. P. Branch's ex'r. Story's Eq. Pl., s. 99–100, n. 2; s. 102.

370 Your petitioner further shews that he is still the holder of said judgment and the bonds upon which the same is founded, and that neither have been paid in whole or in part.

He therefore prays that he may be made a party complainant to said bill of George A. Cunningham, and that he may be decreed to be entitled to all the relief which may be granted to said Cunningham, hereby offering to pay his *pro rata* of expenses and uniting in the prayers of said bill and supplemental bill for that purpose.

And your petitioner will ever pray, &c.

W. W. MONTGOMERY,
CHAS. N. WEST,
Compl't's Solicitors.

Order Making John P. Branch Party Compl't.

GEORGE A. CUNNINGHAM
vs.
THE MACON & BRUNSWICK R. R. Co. *et al.* } Creditors' Bill, &c.

Upon the petition of John P. Branch, a citizen of the State of Virginia, setting forth that he is a creditor of the Macon & Brunswick Railroad Company and shewing that his claim is of the same

character with that of the complainant in the above-stated
371 case and entitled to *pro rata* with the latter in any fund which may be realized from the mortgage which said bill and supplemental bill seeks to foreclose, it is ordered that said John P. Branch be made a party complainant in said cause and that his said petition be filed as a part of the record in the case.

Presented in open court, taken under consideration, now granted as of date of hearing the cause.

May 29th, 1890.

DON A. PARDEE, *Judge.*

Filed June 28th, 1890.

S. F. B. GILLESPIE, *Dep. Clerk.*

Endorsement: United States circuit court, southern district of Georgia, eastern division. Geo. A. Cunningham *vs.* The Macon & Brunswick Railroad Co. *et al.* J. P. Branch's petition to be made party. Filed in office June 3, 1890. S. F. B. Gillespie, deputy clerk.

Petition & order by judgment creditor to be made party proper practice. Myers *vs.* Fenar, 5th Wallace, 205; see 111 U. S. R., 640 (Johnson *vs.* Waters). Is State as trustee "indispensible party"? McRae *vs.* Branch Bank of Ala., 19 How., 376.

372 And afterwards, to wit, on the 28th day of June, 1890, the following proceedings were had:

Decree Dismissing, with Allowance of Appeal.

United States Circuit Court, Southern District of Georgia, at Savannah.

GEORGE A. CUNNINGHAM and Another, Complainant-, *vs.* THE MACON & BRUNSWICK R. R. Co. *et al.* } In Equity.

This cause came on to be heard at the May term of said court, 1890, and was argued; whereupon, the court considering that the sale made by the State of Georgia of the Macon & Brunswick railroad property on the 1st Tuesday of June, 1875, having been made according to a statute passed by the legislature of the State of Georgia prior thereto, which it was competent for such legislature to make, was a valid sale, and as such divested the complainants of all liens and equities that may have existed in their favor as bondholders of the Macon & Brunswick railroad against the property of the Macon & Brunswick Railroad Company, it is—

373 Ordered, adjudged, and decreed that the bill herein be dismissed with costs, to be taxed.

It is further ordered that the said complainants have leave to take an appeal from this decree within sixty days from the date

thereof on bond in the sum of fifteen hundred dollars ($1,500.00), the same to have effect as granted in open court.

June 28th, 1890.

DON A. PARDEE,
Circuit Judge.

Endorsement: U. S. circuit court, eastern division, southern district of Georgia. George A. Cunningham *et al. vs.* The Macon & Brunswick Railroad Company *et al.* Decree dismissing, with allowance of appeal. Filed June 28th, 1890. S. F. B. Gillespie, deputy clerk.

And afterwards, to wit, on the 5th day of July, 1890, came the complainants and entered the following appeal from decree:

374 *Appeal from Decree.*

In the Circuit Court of the United States, Southern District of Georgia.

GEORGE A. CUNNINGHAM *et al.*, Complainants,
and
THE MACON & BRUNSWICK R. R. Co. *et al.*

And now comes the said complainants, George A. Cunningham and John P. Branch, by their solicitors, Wm. W. Montgomery and Charles N. West, upon the rendition of the final decree of said court dismissing their said bill of complaint, and pray an appeal from the said decree to the Supreme Court of the United States.

In open court.
July 5th, 1890.

WM. W. MONTGOMERY,
CHAS. N. WEST,
Compl'ts' Sols.

The said appeal is granted.
In open court, by order of said circuit court.
Savannah, July 5th, 1890.

S. F. B. GILLESPIE, *Dep. Cl'k.*

Endorsement: Circuit court of U. S., eastern division, southern dist. of Ga. Geo. A. Cunningham *et al.* and The Macon & Brunswick R. R. Co. *et al.* Filed July 5th, 1890. S. F. B. Gillespie, dep. cl'k.

375 *Petition for Allowance of Appeal.*

GEORGE A. CUNNINGHAM and JOHN P. BRANCH, Complainants,
and
THE MACON & BRUNSWICK RAILROAD COMPANY, THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, THE FIRST NATIONAL BANK OF MACON, and John H. James, Defendants.

To the honorable the Supreme Court of the United States:

The petition of George A. Cunningham and John P. Branch, the above-named complainants, respectfully showeth that upon the 29th

day of September, 1877, the said George A. Cunningham filed his bill in the circuit court of the United States for the southern district of Georgia against the above-named The Macon & Brunswick Railroad Company and against Edward A. Flewellen, W. A. Lofton, and George S. Jones, styling themselves "directors of the Macon & Brunswick railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James, defendants
376 and appellees, praying for the foreclosure of a statutory mortgage on the Macon and Brunswick railroad in favor of said complainant, as a bondholder of said railroad company, and other bondholders of said railroad company, and upon other property owned by said road, and alleging that complainant and his co-bondholders were second-mortgage bondholders; that their bonds had been endorsed by the State; that the company had failed to pay the accruing interest on the bonds, and that by the terms of the contract the principal had thereby become due; that by the terms of the statutory mortgage the State was made trustee for the bondholders, with power to sell the property covered by the mortgage upon default in payment of the coupons on the bonds; that in alleged pursuance of such power the governor of Georgia had sold said property and bid it in for the State of Georgia and applied the proceeds to the payment of the first-mortgage bonds, or rather had kept the road as the property of the State, paying the first-mortgage bonds (upon which the State was also endorser) out of the general funds of the State and repudiating the claims of the
377 second-mortgage bondholders; that complainant George A. Cunningham, for himself and such of his co-obligees as choose to join in the suit, elected to repudiate the sale made by their trustees, at which the trustees had bought the property exposed to sale, and prayed that the sale be decreed void; that part of the property so sold had passed into the hands of the First National Bank of Macon; that the defendants Flewellen, Lofton, & Jones, styling themselves "directors of the Macon and Brunswick railroad," were now in possession of the road and operating it; that J. W. Renfroe was in possession of part of the property on which complainants and his co-obligees had a lien under said mortgage superior to all others; that said Colquitt was in possession of certain deeds made by the governor of the State purporting to convey said railroad and other mortgaged property to the State of Georgia under said sale, and praying that said deeds be cancelled, and that John H. James, with others unknown to complainant, was a holder of bonds of the State which had been exchanged for the first-mortgage bonds of the Macon and Brunswick railroad, and praying that if the statutory mortgage should be held to be mortgage of
378 indemnity to the State that then Renfroe be enjoined from paying the whole of the money appropriated by the State to the payment of said State bonds so exchanged as aforesaid, and that he be decreed to divide its *pro rata* among all the holders of the bonds of said company endorsed by the State; that complainant owned more than $5,000 in value of said bonds; to which

bill defendants demurred upon the ground that it was in effect a suit against the State of Georgia. The said circuit court sustained the said demurrer and dismissed the said bill as to the said Richard A. Flewellen, W. A. Lofton and George S. Jones, J. W. Renfroe, and Alfred H. Colquitt, by a decree.

From which decree the said complainant, George A. Cunningham, appealed to the Supreme Court of the United States.

And afterwards, to wit, at the October term, 1883, of said Supreme Court of the United States, the said decree was affirmed. Thereupon, after the return and filing of the mandate in said circuit court, to wit, at May rules, 1886, an order was entered taking the said bill of complaint *pro confesso* as to said defendant, The Macon & Brunswick Railroad Company, and that the cause proceed *ex parte* as to it.

That afterwards, on the 30th day of December, 1886, and
379 before final decree against said The Macon & Brunswick Railroad Company, the said circuit court granted to the said complainant, George A. Cunningham, leave to file a supplemental bill in said cause, making the said East Tennessee, Virginia and Georgia Railway Company a party defendant to the original bill; that upon said day, in pursuance of said leave, the said complainant did file his supplemental bill, making said railway company a party defendant and alleging the purchase by said railway company of the property specified in the original bill pending — this cause and with notice of the matters and things complained of, and was by virtue of said matters and things and of said purchase with notice and of the matters and things stated in said supplemental bill a trustee for the said complainant in respect of his said bonds and of the property so purchased by said railway company, and prayed that the said complainant should have a decree of foreclosure of the equity of redemption of the said railway company in and to the said complainant's said demand in the original bill contained; that the said complainant should have the full benefit of the said original bill and proceedings against the said railway company, and that
380 he might have the same relief against the said railway company that he might or could have had against the said Macon & Brunswick Railroad Company if the title to said property were still in said railroad company, and prayed for other relief; that the said The East Tennessee, Virginia and Georgia Railway Company appeared to the bill and answered; to which answer the said complainant filed his general replication.

That on the 29th day of May, 1890, on the petition of John P. Branch, alleging himself to be the owner of and holder of bonds of the same nature and character as those of the said George A. Cunningham *with* — sum of twenty-five thousand dollars, he, the said John P. Branch, was, by order of said circuit court, admitted to be a party complainant in said cause.

That subsequently, to wit, at the April, 1890, term of said circuit court, the said cause was heard on the original and supplemental bill, answer, and evidence; whereupon, on the 28th day of June, 1890,

the said circuit court by final decree dismissed the said bill with costs, to be taxed.

Wherefore these appellants appeal from the whole of said
381 decree of said circuit court, and respectfully pray that the decree of said circuit court and the bill and other proceedings in the cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and that the decree of the circuit court and every part thereof may be reversed and a decree made reinstating said cause with costs or such other decree as to the Supreme Court shall seem just.

Dated September 2d, 1890.

W. W. MONTGOMERY,
CHAS. N. WEST,
Solicitors for Appellants.

Order Allowing Appeal.

In the Circuit Court of the United States, Southern District of Georgia, Eastern Division.

GEORGE A. CUNNINGHAM and JOHN P. BRANCH, Complainants, and THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*, Defendants.	Bill for Relief.

382 The said complainants having petitioned for an appeal from the final decree of said circuit court dismissing the bill with costs, to be taxed, and having tendered their bond, with good and sufficient surety, in the sum of fifteen hundred dollars for the prosecution of their appeal to effect, and if they fail to make their plea good that they shall answer all costs, and having tendered citation to be duly signed, it is ordered that the appeal of the said complainants be, and the same is hereby, allowed, and the said bond and security are hereby approved.

Sept. 8th, 1890.

DON A. PARDEE,
Circuit Judge.

Endorsement: In the circuit court of the United States, southern district of Georgia. George A. Cunningham *et al.*, complainant-, and The Macon & Brunswick R. R. Co. *et al.*, defendants. Petition for allowance of appeal and order thereon. Filed Sept. 11th, 1890. S. F. B. Gillespie, deputy clerk U. S. cir. c't.

383 *Bond on Appeal.*

Supreme Court of the United States.

GEORGE A. CUNNINGHAM *et al.*
vs.
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.* } In Equity.

Know all men by these presents that we, George A. Cunningham and John P. Branch and C. H. Phinizy, the said C. H. Phinizy being of Augusta, Georgia, are jointly and severally held and firmly bound unto the Macon and Brunswick Railroad Company, the — Tennessee, Virginia and Georgia Railway Company, John H. James, and First National Bank of Macon in the sum of fifteen hundred dollars, to be paid to the said The Macon and Brunswick Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, John H. James, and the First National Bank of Macon, their assigns, executors, and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of August, 1890.

384 Whereas the above-named George A. Cunningham and John P. Branch have prosecuted an appeal to the Supreme Court to reverse the decree rendered in the above-entitled action by the circuit court for the southern district of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named George A. Cunningham and John P. Branch shall prosecute their said appeal and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE A. CUNNINGHAM. [L. S.]
——— ———. [L. S.]
——— ———. [L. S.]

Sealed and delivered in presence of me by the said George A. Cunningham, in the county of Richmond, in the State of Georgia, this August 30th, 1890.

[Seal of Frank E. Fleming, Notary Public, Richmond Co., Ga.]

FRANK E. FLEMING,
Notary Public, Richmond County, Georgia.

385 Supreme Court of the United States.

GEORGE A. CUNNINGHAM *et al.*
vs.
THE MACON & BRUNSWICK RAILROAD COMPANY *et al.* } In Equity.

Know all men by these presents that we, George A. Cunningham and John P. Branch and C. H. Phinizy, the said C. H. Phinizy being of Augusta, Georgia, are jointly and severally held and firmly bound

unto the Macon & Brunswick Railroad Company, the — Tennessee, Virginia and Georgia Railway Company, John H. James, and the First National Bank of Macon in the sum of fifteen hundred dollars, to be paid to the said The Macon and Brunswick Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, John H. James, and The First National Bank of Macon, their assigns, executors, and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of August, 1890.

386 Whereas the above-named George A. Cunningham and John P. Branch hath prosecuted an appeal to the Supreme Court to reverse the decree rendered in the above-entitled action by the circuit court for the southern district of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named George A. Cunningham and John P. Branch shall prosecute their said appeal and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

—— ——. [L. S.]
JOHN P. BRANCH. [L. S.]
C. H. PHINIZY. [L. S.]

Witnesses:
R. J. PRESTON.
B. T. S. FULLER.

Subscribed in the presence of me by the said C. H. Phinizy, in the county of Richmond and State of Georgia, this first day of September, 1890.

[Seal of H. C. Goodrich, Notary Public, Richmond Co., Ga.]

HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

Consulate General of the United States of America for France, Paris.

Be it known that on the 19th day of August, one thousand eight hundred and ninety, before me, the undersigned, R. J. Pres-
387 ton, vice-consul general of the United States of America, at Paris, in France, personally appeared John P. Branch, personally known to me and known to me to be the person described in and who executed the within instrument, and duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal of office the day and year above written.

[Seal of United States Consulate General, Paris.]

R. J. PRESTON,
Vice-consul General of the United States of America at Paris, France.

STATE OF GEORGIA,
Richmond County.

Personally appeared C. H. Phinizy, the surety on the foregoing bond, who, being sworn, saith that he is worth the penalty named in said bond over and above all exemptions of homestead or any other exemptions and over and above all his debts and obligations of every kind.

He also waives in favor of the obligees of said bond all of said exemptions which now are or which may hereafter be allowed him by law.

C. H. PHINIZY.

388 Sworn to and subscribed before me this first day of September, 1890.

[Seal of Henry C. Goodrich, Notary Public, Richmond Co., Ga.]

HENRY C. GOODRICH,
Notary Public, Richmond Co., Ga.

Endorsement: In the circuit court of the United States, southern district of Georgia. Geo. A. Cunningham *et al. vs.* The Macon & Brunswick R. R. Co. *et al.* Appeal bond. Filed in clerk's office September 11th, 1890. S. F. B. Gillespie, deputy clerk U. S. cir. c't.

Afterwards, to wit, on the 11th day of September, 1890, the following citation was issued:

Citation.

By the Honorable Don A. Pardee, one of the judges of the circuit court of the United States for the southern district of Ga., to the Macon & Brunswick Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, the First National Bank of Macon, and John H. James:

Whereas George A. Cunningham and John P. Branch have
389 lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Georgia, eastern division, made in favor of you, the said The Macon & Brunswick Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, The First National Bank of Macon, and John H. James, and have filed the security required by law, you are therefore hereby cited to appear before the Supreme Court, at the city of Washington, on the first Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the fifth circuit court of the United States this the eighth day of September, in the year of our Lord one thousand eight hundred and ninety.

DON A. PARDEE,
Circuit Judge.

Endorsement: In the circuit court of the United States, southern district of Georgia. Geo. A. Cunningham *et al. vs.* The Macon & Brunswick R. R. Co. *et al.* Citation. Filed in office Sept. 11, 1890. S. F. B. Gillespie, dep'y clerk U. S. circuit court.

390 And afterwards, to wit, on the 16th day of September, 1890, the marshal of the southern district of Georgia made his return in the following words:

Return of Marshal, Southern Dist. of Ga.

I hereby certify that I did, on the 13th day of October, 1890, in the city of Macon, in my district, serve a copy of the within citation on I. C. Plant, president of the First National Bank of Macon, by handing same to him personally. I further certify that on the 16th day of September, 1890, I personally served a copy on J. H. Turner, general agent of the East Tennessee, Virginia and Georgia Railway Company, in Macon, Georgia.

My return dated at Macon, Ga., this 16th day of September, 1890.

W. P. CORBETT, *U. S. Marshal,*
By OSCAR L. ARFWEDSON, *Deputy.*

Filed in clerk's office Oct. 21, 1890.

S. F. B. GILLESPIE,
Deputy Clerk.

391 Afterwards, to wit, on the 6th day of October, 1890, the marshal of the northern district of Georgia made his return of service as follows:

Return of Marshal, Northern Dist. of Ga.

I have this day served the citation issued in this cause by personally serving a certified copy thereof on John H. James at Atlanta, Fulton county, Georgia, this 6th day of October, 1890.

A. E. BUCK, *U. S. M.,*
By O. E. MITCHELL, *Deputy.*

Filed in clerk's office Oct. 21st, 1890.

S. F. B. GILLESPIE,
Deputy Clerk.

Afterwards, to wit, on the 13th day of October, 1890, the marshal of the southern district of Georgia made his return as follows:

Marshal's Return, Southern Dist. of Ga.

I hereby certify that at Leesburg, Ga., in my district, on October 11, 1890, I served The Macon & Brunswick Railroad Company, defendant, with the within citation by serving a copy thereof on Robert N. Ely, solicitor of record in said case for the said Macon

and Brunswick Railroad Company, by handing said copy to him in person.

My return dated Macon, Ga., this 13th day of October, 1890.

WALTER P. CORBETT,
U. S. Marshal.

Filed in clerk's office Oct. 21, 1890.

S. F. B. GILLESPIE, *Dep. Cl'k.*

UNITED STATES OF AMERICA, } ss:
So. Dist. of Ga., }

I, H. H. King, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the writings and printed matter annexed to this certificate are true copies of their respective originals, and that I have compared the same and they are true transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of George A. Cunningham *et al.*, complainants, and The Macon and Brunswick Railroad Company *et al.*, defendants, lately pending in said circuit court and appealed by the complainants, George A. Cunningham *et al.*, to the Supreme Court of the United States.

I further certify that the circuit court of the United States for the eastern division of the southern district of Georgia finally adjourned for the April term of said court on the 1st day of November, 1890.

In witness whereof I have hereunto set my hand and duly affixed the seal of the said court, at Savannah, in said district, this 18th day of December, A. D. 1890, and of the Independence of the United States the one hundred & fifteenth.

Seal U. S. Circuit Court, Georgia.

H. H. KING, *Clerk.*

Endorsed on cover: Case No. 14,490. S. Georgia C. C. U. S. No. 388. George A. Cunningham and John P. Branch, appellants, *vs.* The Macon and Brunswick Railroad Company *et al.* Filed February 24, 1891.

Supreme Court of the United States

OCTOBER TERM, 1894.

GEORGE A. CUNNINGHAM, *et al.*,
Appellants,

vs.

THE MACON & BRUNSWICK RAILROAD COMPANY, *et al.*,
Appellees.

STATEMENT OF FACTS.

The public legislation of the State of Georgia, and the admitted facts in the record make this case—

The Macon & Brunswick Railroad Company was chartered in 1856 to build a Railroad from Macon to Brunswick, Georgia. Its incorporation was confirmed in 1857. It was invested with ample power to issue bonds, and mortgage its Railroad and franchises.

Acts of 1856 (*Ga.*) *p.* 181.
Acts of 1857 (*Ga.*) *p.* 71.

On December 3d, 1866, the Legislature of Georgia passed an Act authorizing the Governor to endorse the bonds of said Road on behalf of the State of Georgia to the extent of $10,000 per mile.

Said Act is as follows:

"*An Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.*

"WHEREAS, The Macon & Brunswick Railroad has been completed to the distance of fifty miles from the city of Macon, and is thoroughly equipped, and daily trains are running thereon, and seventy miles additional are graded and ready for the superstructure; and,

"WHEREAS, Its completion to Brunswick would greatly inure to the benefit of the State in developing its agricultural, commercial and manufacturing interests; and,

"WHEREAS, By reason of the financial embarassments resulting from the late war, the stockholders of said railroad are unable to supply the capital necessary to the completion of this great work.

"SECTION 1. Be it enacted, etc., That his Excellency, the Governor, be and he is hereby authorized to place the endorsement of the State on the bonds of the Macon & Brunswick Railroad Company, which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to-wit.: Before any such endorsement shall be made the Governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens, or mortgages, or other incumbrances, which may in any manner endanger the security of the State; and upon the further condition and express understanding that any endorsement of said bonds, when thus made, shall not only vest the title to all property of every kind which may be purchased with said bonds in the State, until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all of the property of the company, to be enforced as hereinafter provided for.

"SEC. 2. In the event of any bond or bonds endorsed by the State, as provided in the first section of this Act, or the interest due thereon, shall not be paid by said

railroad company at maturity, or when due, it shall be the duty of the Governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company, and apply the earnings of said road to the extinguishment of said bond, or bonds, or coupons, and shall sell the said road and its equipments, and other property belonging to said company *in such manner and at such time as in his judgment may best subserve the interest of all concerned.*"

Georgia Acts 1866, *p.* 127.

Under the State Constitution, then of force, there was no limitation on the legislative power to endorse railroad bonds, or grant State aid. The Constitution provided that "The General Assembly shall have power to "make all laws and ordinances consistent with this "Constitution, and not repugnant to the Constitution of "the United States, which they shall deem necessary "and proper for the welfare of the State."

Const. of Ga. of 1865, *Article II., Sec.* 5, *Par.* 1.

Under the Act of December 3d, 1866, the State of Georgia endorsed $1,950,000 of the bonds of the Macon & Brunswick Railroad Company.

The statutory mortgage provided for in that Act thereupon came into being, and on June 22d, 1870, the said railroad company, "for the purpose of confirming the aforesaid lien" (stated before to be "the lien created by the aforesaid Act in favor of holders of said bonds so endorsed as aforesaid") "and for the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations above referred to and endorsed as aforesaid," executed a mortgage, covering its entire railroad, property and franchise,

to the Governor of Georgia and his successors in office, with the right to enforce the same, as provided in Section 2, of the said act of 1866.

Transcript, p. 12.

On the 1st day of September, 1868, a series of $1,000,000 second mortgage bonds were issued by said railroad company, and secured by a mortgage on said railroad, property and franchises, inferior to the statutory mortgage of said Act of 1866.

Transcript, p. 59.

On October 27th, 1870, the General Assembly of Georgia passed the following Act:

"*An Act to amend an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.*"

"WHEREAS, The Macon & Brunswick Railroad has been completed to Brunswick, requiring a greater outlay of money than was originally contemplated, to place the same in complete running order, and to furnish the necessary cars, engines and machinery; and,

"WHEREAS, The State has, by recent legislation, endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile.

"SECTION 1. The General Assembly of the State of Georgia do enact, That the above recited Act be so amended as to authorize the Governor to place the endorsements of the State, to the extent of three thousand dollars per mile, upon the bonds of said Macon & Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory.

"SEC. 2. Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed."

Georgia Acts, 1870, *p.* 336.

Concurrently with the passage of this Act, the trustees of the first mortgage bonds executed an instru-

ment, by written consent of the holders of the first mortgage bonds, by which they "postponed the lien of the said first mortgage in such manner and to such extent that the endorsement of the State of Georgia upon the bonds of the said Macon & Brunswick Railroad Company to the extent of $3,000 a mile, being $600,000 in all, authorized by the Act of the Legislature of the State of Georgia, passed October 27, 1870, entitled, 'An Act to amend an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes,' should stand as a lien or mortgage on said property of said Macon & Brunswick Railroad Company prior to the lien of said mortgage executed and delivered to them as Trustees, so as to comply with the terms of the Constitution of the State of Georgia and the law of said State authorizing said endorsement.

Record p. 35. 15

Upon the filing of this postponement of lien with the Governor, he, having decided that all of the constitutional and legal requirements respecting the endorsement of the State had been complied with, placed that endorsement upon $600,000 of bonds issued under the act of 1870, and they passed into the hands of purchasers. The complainants in this bill are holders of these bonds, and the present suit is based upon them.

Record p. 5. (2, 60, 151.)

On December 9th, 1871, a law was enacted establishing a special committee to investigate and report upon the validity of all of the bonds issued or endorsed by the State of Georgia. Its pertinent parts are as follows:

"*An Act to protect the people of the State of Geoagia against the illegal and fraudulent issue of bonds and securities and for other purposes connected with the same.*

"WHEREAS, Divers bonds, purporting to be bonds of the State of Georgia, and divers bonds bearing endorsement of the State, have been issued and put in circulation by Rufus B. Bullock, late Governor of said State, and divers bonds issued prior to his administration have been negotiated by him; and whereas it is believed that a large portion of said bonds have been illegally and fraudulently issued and negotiated, and the extent and amount of said bonds so issued and negotiated is unknown to this General Assembly.

"SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Georgia that there shall be a committee appointed of three—one by the President of the Senate and two by the Speaker of the House of Representatives—who shall have full power and authority to examine and ascertain the number of bonds which have been issued, as herein before recited in the preamble of this Act, and the aggregate amount thereof; and so far as they have been sold or hypothecated, by whom sold, the amount paid, to whom paid, when paid, for what purpose negotiated, and all other facts connected with the history of said bonds, and to report the same to the General Assembly at its next session.

"SEC. 2. That said committee so appointed be authorized and required to meet and sit in the City of Atlanta during a term not exceeding sixty days, commencing March 1, 1872, for the purposes named in the first section of this Act, and said committee are hereby invested with full power and authority to examine witnesses under oath, to send for persons, books and papers, and to exercise such other powers as may be necessary to carry into effect the provisions of this Act.

Georgia Acts 1871–72, *p.* 14.

The report was made and widely published prior to August 1st, 1872.

Georgia Acts 1872, *p.* 516.

On August 14th, 1872, the following joint public resolution of the General Assembly of Georgia was approved by the Governor:

"*A Resolution in Reference to the State's Guaranty on the Bonds of the Macon & Brunswick Railroad Company.*

"*Resolved*, By the Senate and House of Representatives in General Assembly met, and it is hereby resolved by authority of the same, that the State's guaranty placed on the bonds of the Macon & Brunswick Railroad Company is binding on the State."

Georgia Acts 1872, *p.* 518.

On the faith of the above resolution, and of the security of the first lien securing said bonds, complainants purchased their respective bonds.

Transcript, pp. 3, 15.

On July 1st, 1873, the M. & B. R. R. Co. made default in the payment of interest on all of its bonds, and on July 2d, 1873, the Governor of Georgia seized the road on the information of such default conveyed by holders of endorsed bonds.

Transcript, pp. 70, 71.

The deed of the Governor of Georgia to the State, of date June 3, 1875 (Record, p. 58), shows that this seizure was made in pursuance of the act of 1866.

At the time that the seizure was made by the Governor of the State the bonds now in question stood with the guarantee of the State approved, the State recognizing its liability upon the bonds to the fullest extent. The holders, therefore, of those bonds were not only concerned in the seizure by virtue of the liability of the road

itself upon the bonds, but by reason of the liability of the State.

The State continued to operate the road until June 18, 1875; during all this time the State received the earnings of the road and paid the net earnings into its own treasury, treating the road as if it was its own property, in which no one else had any interest of any sort.

On March 6th, 1875, a public resolution was passed by the General Assembly of Georgia as follows:

"*Resolved*, By the General Assembly of the State of Georgia, that the State's endorsement upon the first mortgage bonds of the Macon & Brunswick Railroad, to the amount of one million, nine hundred and fifty thousand dollars ($1,950,000), issued under an act approved the 3d day of December, 1866, is valid and binding upon the State, and the State's liability thereon is hereby recognized and affirmed.

"*Resolved further*, That the State's endorsement upon the bonds of the Macon & Brunswick Railroad, issued under an act approved October 24, 1870, be, and the same is hereby declared unconstitutional, null and void.

"*Resolved further*, That it is the sense of this General Assembly that the Macon & Brunswick Railroad, with its franchises, equipments and appurtenances, be sold by the Governor at an early date, and, if found to be practicable, as early as the 1st day of June, 1875, at public or private sale, and upon such terms, and for such price, in money or first mortgage endorsed bonds of the Macon & Brunswick Railroad, or bonds of the State, *as in his judgment may be consistent with the interest of the State;* provided, that no commissions or percentage shall be authorized or allowed in said sales."

Georgia Acts 1875, *p.* 371.

Under this resolution the Governor issued his proclamation on April 5th, 1875, offering said road for sale, on the first Tuesday in June following.

It will be observed by examination of this resolution that the Governor of the State was instructed by the Legis-

lature repudiating the endorsement of the State, to sell the railroad on June 1, 1875, upon such terms and for such price in money or first mortgage endorsed bonds of the Macon & Brunswick Railroad, or bonds of the State, as in his judgment *might be consistent with the interests of the State.* By the terms of this resolution the holders of the second series of endorsed bonds were not permitted to tender or use their bonds in payment.

For a long time prior to March, 1875, the equitable principle had been established by the Supreme Court of Georgia, that a purchase by a trustee at his own sale was constructive fraud, and passed no title, at the option of the cestui que trust.

Worthy vs. Jackson (8 *Ga.* 236).

"The doctrine, however, maintained, as it respects this class of Trustees, by this Court, is that when a purchase is made by a Trustee on his own account of the estate of the cestui que trust, although sold at public auction, it is the option of the cestui que trust to set aside the sale, whether bona fide made or not, and that it is voidable only, and not absolutely void."

Concerning the decisions of the Supreme Court of Georgia it was provided by the act of the Legislature of that State on December 9, 1858, page 74, as follows:

"Be it enacted that from and after the passage of this Act, the decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be made by a full Court, and in which all three of the Judges have or may concur, shall not be revised, overruled or changed; but the same is hereby decreed to be, and shall be considered, regarded and observed by all the Courts of this State as the law of this State, when it has not been changed by legislative enactment, as fully and to have the same effect as if the same had been enacted in terms by the General Assembly."

It will be seen from this decision and Statute, that if the State of Georgia was a Trustee for the creditors of the Macon & Brunswick Railroad, after seizure, she had no power, under the general law, to purchase the property at public outcry even, without running the risk of having the sale disaffirmed by the beneficiaries, at their option.

In the proclamation the Governor stated that he had become satisfied that it would be for the best interest of the State and all concerned that all the property of the Company seized under his former order should be sold at an early date. But on March 24, 1875, eleven days previously, he had written to the then receiver, "I think I will advertise the Macon & Brunswick Railroad property for sale the first Tuesday in June next. I fear, however, that the time will not be as favorable as a later date would be, but I am weary of the road and the whole villainous business, and as the Legislature has indicated the first of June for the sale, I am inclined to conform to their wishes."

Record, p. 57. (24, 151)

The Legislature having thus instructed the Governor to sell the road on the day fixed by it, and not by him in pursuance of his duty under the act of 1866, and he accepting that wish expressly against the judgment which the Act of 1866 required him to use for the best interest of all concerned, and the endorsement of the State having been repudiated three months before the sale, and *eo instanti* the sale having been ordered, and the holders of these bonds cut off from using their bonds in payment, the road was sold by the Governor, and was purchased by him for the State on the first Tuesday in June

for $1,000,000. (*Record, p. 148.*) As he purchased under the authority of the Act of 1875 the assumption is that the sale was for less than the intrinsic value of the property, and that it was sacrificed.

But this assumption does not stand without facts. By reference to the Act of 1866, it will be found that before a bond was issued, 120 miles had been graded and 50 miles finished and trains running in and out from the city of Macon. At the lowest possible estimate this was worth $600,000. In addition to this, $1,950,000 endorsed bonds were spent upon the road, and $1,100,000 and $600,000 second mortgage bonds.

There is no evidence that these moneys were not spent upon the road. There is no evidence that the $600,000 *were* spent upon the road, except the admission of the Governor by his endorsement. But the Acts of 1866 and 1870 are conclusive as to the fact that the previous sums, before the $600,000 were issued, had been used upon the property.

The authority under which the State purchased at this sale and held said road thereafter, was claimed under the following Act of her General Assembly:

"WHEREAS, it is provided in the Acts authorizing the State to endorse the bonds of certain railroads, and upon the happening of certain contingencies therein specified, to seize and sell the same; and,

"WHEREAS, There is no authority given by law to protect the State in case any of the said roads were likely to be sacrificed under said sales, for remedy whereof.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, That whenever any railroad having the State's endorsement upon its bonds shall be brought to sale under the laws of force touching the same, the Governor shall be, and he is hereby authorized and empowered, in the name of the State, to bid for and to buy the same, if at such sale the said railroad is

likely to be sacrificed or sold for an amount less than its intrinsic value, and of which he shall be the judge; provided, the Governor shall in no case bid a larger amount for said road than the State's legal liability.

SEC. 2. Be it further enacted, That if any one or more of the railroads so having the State's endorsement upon its bonds shall be purchased by the State under the foregoing section, then it shall be the duty of the Governor to appoint for each of the said railroads three discreet and responsible persons, who shall take charge thereof as a Board of Directors, with full and ample power to manage the same.

SEC. 3. Be it further enacted, That said board, when so appointed, if in their soundest discretion shall deem it best for the interest of the State to sell, to lease or run the same, they are hereby authorized and instructed with plenary power therefor, upon such terms and time as will yield the greatest amount of money wherewith to relieve the State from its liability; provided, however, that no sale or lease shall be binding upon the State until the same shall have the approval in writing of the Governor endorsed thereon.

Georgia Acts, 1875, *p.* 14.

The State did not pay the sum bid at the sale, or any part thereof, to the bondholders or upon the bonded debt, but operated the road until she disposed of it in 1880, as hereinafter shown.

Georgia Acts 1878–'79, *p.* 155.

Transcript, *p.* 77.

On September 3rd, 1877, the State passed an Act authorizing an issue of State bonds to take up certain railroad bonds endorsed by the State, including therein $1,950,000 bonds of the M. & B. R. R. Co., issued prior to the amendment of 1870.

Georgia Acts 1877, *p.* 11.

(This Act is hereinafter quoted.)

On September 3rd, 1879, the General Assembly of Georgia passed an Act authorizing the Governor to transfer the right, title and interest of the State to a corporation known as the Macon & Brunswick Railroad Company, which had leased said road from the State.

Georgia Acts 1878-'79, *p.* 115.

On February 28th, 1880, the State of Georgia, by its Governor, made a deed to the said Macon & Brunswick Railroad Company under the authority of the above stated Act of September 3rd, 1879.

Transcript, p. 77.

It will be shown hereinafter that said deed operated only as a quit-claim.

On the 14th of June, 1881, the Macon & Brunswick Railroad Company conveyed said railroad without warranty of title to the East Tennessee, Virginia & Georgia Railroad Company.

Transcript, p. 81.

On the 30th of September, 1881, said East Tennessee Virginia & Georgia Railroad Company reconveyed said property upon the same consideration by like deed to the Macon & Brunswick Railroad Company.

Transcript, p. 83.

The effect of these two deeds was to undo the conveyance of the property and revest it in the Macon & Brunswick Railroad Company.

On the 4th of November, 1881, said Macon & Brunswick Railroad Company conveyed said property and all of its right, title and interest therein without warranty to the Cincinnati & Georgia Railroad Company.

Transcript, p. 88.

Said last-named company on the 30th of December, 1881, conveyed said property by like deed to the East Tennessee, Virginia & Georgia Railroad Company.

Transcript, p. 93.

None of these conveyances were by warranty, and each and all of them referred to the original sale from the State to the Macon & Brunswick Railroad Company and to the Act of the Legislature under which the same was executed.

On the 15th of June, 1881, the East Tennessee, Virginia & Georgia Railway Company had executed to the Central Trust Company of New York as Trustee a mortgage covering its property acquired and to be acquired to secure certain bonds.

This Macon & Brunswick Railroad was sold under the foreclosure of said mortgage, as after acquired property, and a deed made under such foreclosure sale to a reorganization committee, known as the Purchasers Committee; said deed being made on the 28th day of June, 1886, and conveying all the right, title and equity of redemption of the East Tennessee, Virginia & Georgia Railroad Company in and to said railroad to said purchaser.

Transcript, p. 127.

On July 1st, 1886, said committee conveyed such title as they had received under the foreclosure deed to the East Tennessee, Virginia & Georgia Railroad Company, defendant herein.

Transcript, p. 136.

On the 29th day of September, 1877, and while the State was still in possession, the original complainant,

Geo. A. Cunningham, filed his bill in this cause against the Macon & Brunswick Railroad Company and against Edward A. Flewellen, W. A. Lofton and George S. Jones, styling themselves "Directors of the Macon & Brunswick Railroad;" J. W. Renfroe, Treasurer of the State of Georgia; Alfred H. Colquitt, Governor of the State Georgia; the First National Bank of Macon and John H. James, defendants and appellees, praying for the foreclosure of a statutory mortgage on the Macon & Brunswick Railroad in favor of said complainant, as a bondholder of said railroad company, and other bondholders of said railroad company, and upon other property owned by said road, and alleging that complainant and his co-bondholders were second mortgage bondholders; that their bonds had been endorsed by the State; that the company had failed to pay the accruing interest on the bonds, and that by the terms of the contract the principal had thereby become due; that by the terms of the statutory mortgage the State was made trustee for the bondholders, with power to sell the property covered by the mortgage upon default in payment of the coupons on the bonds; that in alleged pursuance of such power the Governor of Georgia had sold said property and bid it in for the State of Georgia and applied the proceeds to the payment of the first mortgage bonds, or rather had kept the road as the property of the State, paying the first mortgage bonds (upon which the State was also endorser) out of the general funds of the State and repudiating the claims of the second mortgage bondholders; that complainant, George A. Cunningham, for himself and such of his co-obligees as choose to join in the suit, elected to repudiate the sale made by their Trustees, at which the Trustees had bought the property exposed to sale, and

prayed that the sale be decreed void; that part of the property so sold had passed into the hands of the First National Bank of Macon; that the defendants, Flewellen, Lofton and Jones, styling themselves "Directors of the Macon & Brunswick Railroad," were now in the possession of the road and operating it; that J. W. Renfroe was in possession of part of the property on which complainants and his co-obligees had a lien under said mortgage superior to all others; that said Colquitt was in possession of certain deeds made by the Governor of the State purporting to convey said railroad and other mortgaged property ta the State of Georgia under said sale; and praying that said deeds be cancelled, and that John H. James, with others unknown to complainant, was a holder of bonds of the State which had been exchanged for the first mortgage bonds of the Macon & Brunswick Railroad, and praying that if the statutory mortgage should be held to be mortgage of indemnity to the State that then Renfroe be enjoined from paying the whole of the money appropriated by the State to the payment of said State bonds so exchanged as aforesaid, and that he be decreed to divide it pro rata among all the holders of the bonds of said company endorsed by the State; that complainant owned more than $5,000 in value of said bonds.

To which bill defendants demurred upon the ground that it was in effect a suit against the State of Georgia; the said Circuit Court sustained the said demurrer and dismissed the said bill as to the said Edward A. Flewellen, W. A. Lofton and George S. Jones, J. W. Renfroe and Alfred H. Colquitt by a decree, leaving the bill pending as to the Macon & Brunswick Railroad

Company, the First National Bank of Macon and John H. James.

From which decree the said complainant, George A. Cunningham, appealed to the Supreme Court of the United States.

Afterwards, at the October term, 1883, of said Supreme Court of the United States, the said decree was affirmed. Thereupon, after the return and filing of the mandate in said Circuit Court, to-wit: at May rules, 1886, an order was entered taking the said bill of complaint pro confesso as to said defendant, the Macon & Brunswick Railroad Company, and that the cause proceed *ex parte* as to it.

Afterwards, on the 30th day of December, 1886, and before final decree against said The Macon & Brunswick Railroad Company, the said Circuit Court granted to the said complainant, George A. Cunningham, leave to file a supplemental bill in said cause, making the said East Tennessee, Virginia & Georgia Railroad Company a party defendant to the original bill. Upon said day, in pursuance of said leave, the said complainant did file his supplemental bill, making said railroad company a party defendant and alleging the purchase by said railroad company of the property specified in the original bill pending this cause and with notice of the matters and things complained of, and was by virtue of said matters and things and of said purchase with notice and of the matters and things stated in said supplemental bill a Trustee for the said complainant in respect of his said bonds and of the property so purchased by said railroad company; and prayed that the said complainant should have a decree of foreclosure of the equity of redemption

of the said railroad company in and to the said railway property in the original bill contained; that the said complainant should have the full benefit of the said original bill and proceedings against the said railroad company, and that he might have the same relief against the said railroad company that he might or could have had against the said Macon & Brunswick Railroad Company if the title to said property were still in said railroad company; and prayed for other relief; that the said East Tennessee, Virginia & Georgia Railroad Company appeared to the bill and answered, to which answer the said complainant filed his general replication.

On the 29th day of May, 1890, on the petition of John P. Branch, alleging himself to be the owner and holder of bonds of the same nature and character as those of the said George A. Cunningham with sum of twenty-five thousand dollars, he, the said John P. Branch, was by order of said Circuit Court, admitted to be a party complainant in said cause.

Subsequently, at the April, 1890, term of said Circuit Court, the said cause was heard on the original and supplemental bill, answer and evidence; whereupon, on the 28th day of June, 1890, the said Circuit Court, by final decree, dismissed the said bill with costs. to be taxed; and from this decree an appeal was taken to this Court.

ASSIGNMENT OF ERRORS.

1. The appellants assign as error the final decree of the Court dismissing the whole bill in this: That by the facts stated in the original and supplemental bill, and admitted by the answer or proved by the evidence, the State of Georgia, when it seized the property of the Macon & Brunswick Railroad Company, became a Trustee

for all persons legally concerned in the road; that the complainants, as bondholders of the Company, were legally concerned in the sale of the road; that the complainants were subrogated to the statutory lien of the State under the act of 1870; that the State, by its seizure, became a Trustee for the complainants in the sale of the road;

2. That the State, by its method of sale and by its command to its Governor to sell the road in the manner in which the sale was made, committed an actual fraud upon the appellants;

3. That the State, through its Governor in selling the road on the first Tuesday in June, 1875, acted contrary to the interest of all concerned, with full knowledge of the facts, and was thus guilty of actual fraud upon the appellants; that the State, being such Trustee, committed a breach of trust by purchasing the road at its own sale; and that the purchase by it was a constructive fraud upon the appellants;

4. That the State therefore remained a Trustee after the purchase by it of the appellants as to this property, and that Cooper and all others, down to the present defendant, the East Tennessee, Virginia and Georgia Railroad, and including the said defendant, who is the last purchaser of the property, had notice of the trust, and became trustees of the property so purchased by them as to the appellants;

5. And that the property is now in the hands of the said defendant in trust for the appellants in this cause, and that the said appellants were entitled to a decree establishing their lien upon the said property for the enforcement of their debt as a trust debt secured by a statutory lien against the said property, and to have the

same sold through a receiver of the Circuit Court of the Southern district of Georgia, so as to satisfy the debt due to the appellants.

ARGUMENT.

THE TRUST.

1. WHEN THE ROAD WAS SEIZED BY THE STATE, AND WHEN IT WAS SOLD UNDER SUCH SEIZURE, THE PROPERTY WAS THE SUBJECT OF A TRUST UNDERTAKEN BY THE STATE FOR THE BENEFIT OF THE COMPLAINANTS IN THIS CAUSE AS HOLDERS OF BONDS OF THE ROAD.

The Act of 1866, of which the Act of 1870 was expressly amendatory, provided that when a default should occur in the payment of the coupons on those bonds, the Governor should seize and sell the road and its equipment, and other property belonging to the Company, in such manner and at such time as in his judgment might best subserve *the interests of all concerned.*

It needs no argument to demonstrate that those *concerned* in the sale of the road were not only the State, upon its admitted liabilities, but every creditor. There was, therefore, a contract between the State and all purchasers of those bonds, or creditors of the road, that if it should exercise the power of seizure and sale, it would so sell as to subserve the interest of all creditors. Thus the trust was created by express statute.

The holders of these bonds were not beneficiaries of this trust by nature of mere creditorship. The bonds were issued under the act of 1870, which was *expressly amendatory* to the act of 1866. These bondholders therefore held bonds, concerning which a statute had been

passed, expressly pointing out the act of 1866 and constituting a trust which was expressly reaffirmed by the act of August 14, 1872.

This declaration of trust was a matter of grave importance in the marketing of these bonds. Containing, as the statute did, the pledge that the State, if it seized, should sell the road *so as to subserve the best interests of all concerned*, and the declaration being made concerning these bonds, purchasers had the assurance by the State that in such sale it would not act for its own interest, but as a Trustee for all. The gravity of this assurance can not be over-estimated.

DECIDED CASES OF STATUTORY TRUSTS.

Decided cases exist which uphold the view that these statutes of the State provided an express trust.

A very similar trust was declared by this Court to exist by virtue of the statutory provisions of the State of South Carolina in Baring vs. Dabney, 19 Wall. 1.

The differences existing between that case and this are these :

1. That in the Fire Loan Bond case the statute mentioned the creditors for whom the trust was construed by the Court to exist ; whereas, in the case at bar, the trust is declared by the statute under which the bonds were issued, before their issuance, without naming the persons.

2. That in the Fire Loan Bond case the statute was passed after the bonds were issued and purchased and held by the owners ; whereas, in the case at bar, the purchases were based on the declaration of the trust that preceded the issuance of the bonds.

Another instance of a statutory trust is to be found in Curran vs. Arkansas, 15 How. 304.

Also Board of Liq. vs. McComb, 92 U. S. 531, and Jumel vs. Louisiana, 107 U. S. 711.

ADDITIONAL FEATURE OF THE TRUST.

1. THE TRUST UNDERTAKEN BY THE STATE WAS NOT ONLY IN FAVOR OF A CREDITOR, BUT A CREDITOR WITH A STATUTORY LIEN IN THE NATURE OF A MORTGAGE.

Speaking of the endorsement of these bonds, this Act provides:

"The said endorsement shall be and is hereby understood to operate as a prior lien or mortgage upon all the property of the company, to be enforced as hereinafter provided for."

In the event of default in payment by the railroad company of either principal or interest, the Act makes it the duty of the Governor, "upon information of such default by any holder of said bond or bonds, to seize and take possession of all of the property of said railroad company and apply the earnings of said road to the extinguishment of said bond, or bonds, or coupons, and shall sell the said road and its equipments and other property belonging to said company in such manner and at such time as in his judgment may best subserve the interest of all concerned."

Georgia Acts 1866, *p.* 127.

It is plain from this language that the lien created was for the benefit of the bondholders. While it operated as an indemnity to the State, it did more.

The mortgage was not made to merely reimburse the State any sum it might be called on to pay.

The failure of the railroad company to pay made the mortgage lien immediately enforceable.

It was made mandatory upon the Governor to enforce the lien "*upon information of such default furnished by any holder of such bond or bonds.*"

The bondholder was recognized as the party at interest to call for the enforcement of the remedy provided by the Act.

The Act did not provide for the Governor acting until the bondholders called upon him so to do.

When the road was seized the earnings were to be applied, not to pay the State, *but to extinguish the bonds.*

The road was sold not after payment by the State and to reimburse her, but the Governor was to sell in such way as would *best subserve the interest of all concerned.*

The intention of the parties is valuable as showing the nature of the lien or mortgage created by the Act of December 3rd, 1866.

The mortgage of June 22nd, 1870, recites:

"WHEREAS, The said Macon & Brunswick Railroad Company are desirous of confirming the lien created by the aforesaid Act *in favor of holders of said bonds so endorsed as aforesaid.*"

"Now, therefore, this indenture witnesseth that" * * * for the purpose of confirming the aforesaid lien and for the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations above referred to, and endorsed as aforesaid, with interest thereof according to the true meaning and intent thereof and one dollar the conveyance is made.

Transcript, p. 12.

Defendant admits the execution of the mortgage to the Governor of the State.

Defendant's Answer, Transcript, p. 59.

The parties clearly understood the Act of 1866 as creating a lien for the benefit of the bonds and to provide for their payment.

When a surety, or a person standing in the situation of a surety, receives a security for his indemnity, and to discharge such indebtedness the principal creditor is en titled to the full benefit of the security, even though he did not act upon its credit in the first instance, nor know of its existence.

Kramer's Case, 37 *Penn. St.* 71.

Rice's Appeal, 79 *Penn. St.* 168.

The Court goes on to say :

"The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it attaches to it ; and hence it is that it may be made available by the creditor, although unknown to him at the time of the purchase of the security for which it may be given as an indemnity. The effect of such a transaction is the placing of means in the hands of the surety by the principal debtor on account of his contract of suretyship. It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety, so that it may be applied to the object intended, viz : the payment of the debt of the holder.

Kramer's Case, 37 *Penn. St.* 71.

So, too, in Vermont :

"When the surety on a note takes a mortgage from the principal debtor, conditioned that he will pay the note and save the surety harmless, a trust is thereby created and also an equitable lien on the lands for the benefit of the creditor and the surety, as mortgagee, holds the property, subject to such trust, and equity will compel him to give the creditor the benefit of such lien for the security and payment of his debt.

And the Court says further:

"That the principal had such an *equitable lien* is too well settled to need authority.

Paris vs. Huglet, 26 *Vermont*, 308.

Coming to New York, we find the Courts holding:

"It is a settled rule in equity that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety or person standing in the situation of a surety for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor."

Vail vs. Foster, 4 *N. Y.*, 312.

The principle has been ruled in every State where it has come in question, at least to the extent of holding that where the securities taken are not taken entirely to indemnify the surety in case he has to pay, but are taken to become discharged on the payment of the debt by the principal, and hence are conditioned on the discharge of the debt, and not on the suffering of loss by by the surety only, they are a trust for the creditor. And this is as far as we desire to invoke the principle in this case.

The principle seems to be extended to this point, namely, that the Court does not look at the party to whom the security is given, but will regard such securities taken by either the surety or the creditor as a trust for the payment of the debt, and will, to the end in view, enforce the trust when called upon by an interested party.

The Supreme Court of Connecticut has decided on this point:

cannot, where the debt for which he is surety is represented by different notes held by different parties, so assign his security to some of the creditors as to prefer them to others. The Court will interfere and administer the fund in accordance with the trusts, unaffected by the surety's assignments. In the following case:

"A judgment was assigned to an acceptor to secure him for his acceptances; the acceptances were assigned by him to various parties. To two of these parties he assigned enough of the judgment to cover their acceptances. They enforced the same at their own expense, and claimed to be fully paid first out of the money, leaving only a small and inadequate balance for the other holder.

"*Held*, That the security attached to all the acceptances alike, and the holders were entitled to be paid *pro rata* out of the fund in court, but that the litigant party should, in addition to his dividend, pay a fair share of the costs and expenses out of the share of the other party."

Kramer Case, 37 *Penn St.*, 71.

The principles we have been contending for has been "recognized in the case of the statutory mortgage "created by the Act of 1866. Said Mr. Justice Brad-"ley: A security given by way of indemnity to a "surety may be reached and applied directly to the "payment of the debt on the application of the princi-"pal creditor, and the surety can not prevent such ap-"plication."

Branch vs. Macon & Brunswick Railroad Company, 2 *Woods*, 385.

This is held to be the settled law in—

Deval et al. vs. McIntosh et al., 23 *Ind.*, 529.
Burroughs et al. vs. United States, 2 *Paine, C. C*, 569.
Cullen et al. vs. Branch Bank at Mobile, 23 *Ala.*, 797.
Van Ordan vs. Durham, 35 *Cal.*, 136.
Haven vs. Foley & Papin, 18 *Mo.*, 136.
Troy vs. Smith & Shields, 33 *Ala.*, 469.
Haven vs. Foley & Papin, 19 *Mo.*, 632.
Price vs. Trusdell, 28 *N. J.* (*Eq.*), 200.
Moses et al. vs. Murgatroyd et al., 1 *Johns* (*Ch.*), 119.
Pratt et al. vs. Adams et al., 7 *Paige*, 615.
Kunkle vs. Fitzhugh et al., 22 *Md.*, 527.
Curtis vs. Taylor, 9 *Paige*, 432.
Bank of Auburn vs. Throop, 18 *Johnson*, 505.

The rule is well recognized in England. See the leading cases of—

Mouse vs. Harrison, 9*th Eq. Cases, Ab. K.*, 5.
Wright vs. Modely, 11 *Vesey*, 23.

The text writers of acknowledged authority state it as settled law :

4 *Kent Com.*, 6*th Ed.*, *p.* 307.
1 *Story, Eq. Jur.*, *Sections* 502, 638.

It has been recognized in Georgia :

Clews vs. The Bondholders, 54 *Ga.*, 315.

The Supreme Court of Mississippi, in considering this question, have rendered a series of decisions, to some of which the attention of the Court is now invited.

Say that Court:

"When a conveyance is made to sureties of the granter, conditioned that the conveyance shall be void if the granter pays the debt on which the grantees are sureties, otherwise to remain of full force and virtue; although the creditor knows nothing of the deed, yet, as its provisions are for his benefit, his assent to it will be presumed, and the deed will be held to be not only an indemnity to the sureties, but as a security for the debt. The sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration, without notice."

The Court further say:

"They (the sureties) had no power or right to discharge the trust or to defeat it, unless to a purchaser for a valuable consideration, without notice.

"Wilson, the purchaser in this instance, had notice; he therefore took the estate subject to the trust, and charged with the payment of the debt. In his answer he says that he did not know whether the debt was paid or not; it was his duty to have inquired."

Ross vs. Wilson et al., 7 *Sm. and Mar.*, 753, 766.

The case of *Carpenter, Executrix, vs. Bowen et al.*, 42 *Miss.* 35, was a conveyance made to a trustee for the benefit of a surety on same condition as in Ross vs. Wilson.

The Court held, in the identical language used in the above case, that the trusts were for the creditor, though he was ignorant of the conveyance, and that "the trustee can not discharge or defeat the trust, except to a purchaser for a valuable consideration, without notice."

And in the Supreme Court of Maryland to the same effect is the case of *Owens vs. Miller & Mayhew et al.*, 29 *Md.*, 144.

Following down the reports, we find the same doctrine enunciated:

"It is a well-settled principal that if a creditor obtains a mortgage or other security from the principal debtor the surety is entitled to its protection. So, if the surety has obtained indemnity from his principal, the creditor may avail of it and have satisfaction of his debt out of it.

"Where the security is for the debt as well as the ultimate protection of the surety, it enures to the creditor, and it is of no moment whether it was given at the time the principal obligation was incurred or after, or whether it was known at the time to the creditor or not. The creditor has an interest in it; becomes a *cestui que trust;* the fund or property at once assumes a trust character, and the surety can do no act which will discharge the trust or release the property from the burden to the prejudice of the creditor."

Osborn et al. vs. Noble, 46 *Miss.*, 449.

We find that the usual rule of trusts follows this one. The surety is a trustee, the creditor is his *cestui que trust*, and the trustee can not dispose of his trust property except for the purpose of his trust, which is to pay the creditor his debt. If he does so the creditor can follow the securities disposed of by the surety in the hands of all parties save a *bona fide* purchaser for a valuable consideration, without notice.

New York holds the doctrine strongly, and the case here cited has been followed with approval by many Courts:

"Where a surety took a confession of judgment for his indemnity from the maker of two promissory notes which he had undersigned, sold the maker's property on the execution thereon, and received the proceeds in promissory notes of the purchaser of such property.

"*Held*, that he was in equity a trustee of the last-mentioned notes for the holder of the obligations upon which he has security, and that on his transferring such notes in payment of a precedent debt of his own, or as security for such debt, the transferree could not retain them as against the prior equity of the principal creditor, on the faith of whose debt they had been realized. The latter has the prior and superior equity, and it must prevail over the legal title.

"Where such trustee was entitled to a part of the securities for his own benefit, on the beneficiary tracing a portion less than his to the hands of third persons, the trustee having nothing left in his hands; such third persons can not assume that the portion in their hands was that belonging to the trustee. They stand in this respect in the same position to the beneficiary as the trustee himself.

"The holder of negotiable bills or notes received as security or indemnity, or as payment for a previous liability or indebtedness without relinquishing any valid security or lien, is not protected against the true owner either in law or equity, although the same were taken in entire good faith."

Clark vs. Ely et al., 2 *Sand Ch.* 166.

Massachusetts is in entire harmony with the doctrine.

"A mortgage deed given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and the surety holds the mortgaged property subject to such trust or lien, even after the holder's claim on him to pay the note is barred by the Statue of Limitation and though the property as between the mortgager and the mortgagee may have become absolute by foreclosure.

"The trust created by such mortgage is not secret, and when the mortgage is recorded it gives constructive notice of the trust to all creditors and purchasers, so that they can not, by attachment or grant of the mortgaged property, take it discharged of the trust; and the assignment of the mortgager's estate under the insolvent law of 1838, C. 163, will not, by virtue of Section 5 of that statute, defeat the trust."

Eastman et al. vs. Foster et al., 8 *Metc.*, 19.

And the Courts of Maine are equally as strongly pronounced in its favor:

"The principal debtor in a promissory note conveyed to his surety a certain quantity of timber by a writing in these terms:

"'In consideration that B. D. has become surety to J. W. in the sum of $3,000, I hereby assign to him all the timber cut or to be cut the present season at my mills, etc.'

"The surety also himself borrowed money of the same lender and afterwards, by endorsement, assigned all his interest in the instrument to J. O., whom he subsequently directed to apply the proceeds of the timber, first, to the last-mentioned debt of his own and the balance of the debt of $3,000 due from his own assignor. Hereupon it was held that the instrument conveyed to B. D. all the timber described in it, yet not absolutely, but in pledge and trust, to pay the debt for which he had become surety, and that he had no right to change the appropriation by applying the proceeds to the payment of his own debt."

Ware, Executor, vs. Otis, 8 *Greenleaf, p.* 387.

And it has been held that a payment to the surety will not discharge a mortgage made by him, but conditioned to be void if the debts are paid. Such a mortgage registered was notice; and a purchaser from the mortgager, and, with the surety's consent, got no title. He was bound to enquire of the creditor if he had been paid, and the creditor was held entitled to recover against him. Say the Court:

"A mortgage executed by a debtor directly to his surety to be void if the debts are paid is for the security of the creditor as well as the surety.

"Such mortgage being made without a power of sale by the mortgagee, procludes a sale of the property by the mortgager, with the consent but without the joinder of the mortgagee, unless with the consent of creditors or with satisfaction of their debts. A payment to the surety will not be sufficient."

The Court continues, after citing many cases:

"It follows from these authorities that the mortgage executed to Hickey (the surety) enured to the benefit of all creditors named therein; that as no power of sale was vested in Hickey he could not sell without the consent of his beneficiaries or the aid of a court of equity; that the registration of the mortgage was itself notice to Abraham Saylors, and especially that as its existence was spoken of at the time of his purchase, he was bound to ascertain from the beneficiaries, and not from the statements of the mortgager or mortgagee, whether the debts intended to be secured had been satisfied, and, failing to do so, the deed taken by him is fraudulent and utterly null and void as to such creditors as have not been paid."

Saylors vs. Saylors et al., 3 *Heisk.* (*Tenn.*), 525.

In contending that the provisions of the Act of 1866 did not create a direct trust or lien in favor of the holders of the bonds, our opponents place reliance upon the decision of Mr. Justice Bradley in the case of *Branch vs. the Macon & Brunswick Railroad Company*, 2*nd Woods*, 385; the case of *Chamberlain vs. St. Paul Railroad Company*, 92 *U. S.*, 299; and the *Tennessee Bond Cases*, 114 *U. S.*, 663.

The difference between the cases of Chamberlain vs. St. Paul Railroad Company and the Tennessee Bond Cases and the case at bar is marked.

In the first of these cases the State of Minnesota issued her own bonds, which went into the hands of the public and took a mortgage upon certain lines of the railroad company as indemnity against losses on her own bonds. The railroad company was not bound at all to the State's bondholder. There was no privity between the railroad company and the holder of the State's bond.

The Court say:

"The State was primarily liable to the bondholders, and it was only between her and the company that the relation of surety existed. It may be doubted whether the bondholders could call upon the company in any event."

In the case at bar the railroad company is primarily liable to the bondholders. The relation between the parties is that the bondholder is creditor, the railroad company the principal debtor, and the State the surety upon the debt, and it can not be doubted but that the bondholders can call upon the railroad company in the first instance.

It is clearly a case in which the general doctrine recognized by the Court applies.

Speaking of this, the Court say:

"The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal."

That this property was in the hands of the State after default for this express purpose under the terms of the Act of 1866 can not be questioned.

In the Tennessee Bond Cases the State issued her own bonds and loaned them to the railroad company, who negotiated the same.

The railroads were not parties thereto, and the bondholder could not have brought any suit upon his bonds against the railroad company.

The Act under which the bonds were issued provided that the State should be vested with a lien upon the road and its superstructure and equipment "for the payment of all of said bonds issued to the company, as provided in this Act, and for the interest accruing on said bonds."

The Act is a general one, and under it bonds were issued to a number of companies.

Say the Court:

"The liability of the companies to the bondholders, if any there be, rests alone on the statute, which contemplated loans by the State of its own bonds to the several companies in aid of the public works they were respectively engaged in constructing. The bonds were to be 'coupon bonds of the State of Tennessee.'"

This implies State bonds with coupons for interest attached, in the ordinary form then in use, whereby the faith of a State of the United States was pledged for their payment. Such must have been the understanding of all parties at the time, for the bonds actually issued were of that kind, and on their face bound only the State. The law made no provision for naming, either in or upon a bond, the particular company in whose favor it was issued. Neither did the bonds themselves, as issued, contain, by endorsement or otherwise, any obligation whatever on the part of the companies. They were State bonds, pure and simple, "issued in pursuance and by authority of an Act of the General Assembly of said State, passed February 11th, 1852." They were not even made payable to the companies to which they were respectively issued, but went on the market as coupon bonds of the State of Tennessee, payable to the bearer thereof, and apparently nothing else.

In this form they were bought and sold by dealers and investors in public securities. So that the point to be determined from an examination of the statute is, whether a State, when lending its own bonds and taking back security for their payment, intended to protect those who might afterwards become the holders of the bonds against the consequence of its own repudiation or inability to pay, or only to indemnify itself against loss by reason of the loan of its credit to those who were engaged in constructing its great works of internal improvement.

To say the least, the strong presumption is that, in such a transaction, the purpose of a State would be to protect itself, and not to secure its own pledge of faith to the bondholders by a mortgage from those to whom its credit was loaned.

The Court, further discussing the matter, determines, upon the other provisions of the statute, that the payment which the lien to the State was to secure was not a payment to the holder of the bond, but a payment to the State of the amounts thereof, and demonstrates that under the particular provision of the statute in question the mortgage was made for the benefit of the State alone, and not for the benefit both for the State and the bondholder.

Commenting upon similar language used in a statute of South Carolina, and construed by the Supreme Court of that State in *Hand vs. Savannah & Charleston Railroad Company*, 12 *S. C.*, 314, where the bonds issued were railroad bonds endorsed by the State and where that Court held that the language created a lien, not merely for the protection of the State, but also for the better security of the bonds themselves into whosesoever hands they might fall,

The Court say :

"But as this Court had occasion to say in *Railroad Companies vs. Schutte*, 103 *U. S.*, 118–140, 'Contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed.' Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another than that one ordinary contract means what another does. It must be determined from the language used in each particular one what has been done or agreed to be done in that case. Under the South Carolina statute the primary liability for the payment of the bonds to the respective holders thereof rested on the company, and the State was bound only as surety. This was shown on the face of the bonds themselves, and the language of the statute was, therefore, to be construed with that as the subject matter of the legislation ; that is to say, a guaranty by the State of the obligations of the railroad company. Here the State is the primary obligor, and the legislation is with reference to a loan of State bonds, on which the railroad companies are in no way to appear as bound. The liability of the companies grows out of the borrowing of State bonds, and apparently nothing but State bonds. The loans were to be by the State to the companies, and the object was to secure the payment of the loans. It may well be that the same language when applied to one class of securities means one thing and when applied to another class something else. The question now is, what does it mean in this case ?"

Tennessee Bond Cases, 114 *U. S.*, *p.* 688.

So that these cases, when applied to the case at bar, not only do not establish the contention of defendant's counsel, but strongly support the contrary view.

The decision in *Branch vs. Macon & Brunswick Railroad Company*, 2*nd Wood's*, 385, in no way conflicts with this view. The only question presented in that case was whether the Federal Court would appoint a receiver and take possession of the property while it was in the

hands of the officers of the State. That question was decided adversely to the complainant, on the ground *alone* that it amounted to a suit against the State.

The questions whether this mortgage was given solely by way of indemnity to the surety to reimburse it for money already paid out, or whether the State was a Trustee for the bondholders, or any of the other questions involved in this issue, were not passed upon, but the Court expressly recognizes "the well-known principle of equity—that a security given by way of indemnity to a surety may be reached and applied directly to the payment of the debt, and the surety can not prevent such application."

Speaking further and quoting the language which has been used by defendant's counsel, the Court again recognizes the trust nature of this fund. After stating that the State can not be made a party to the suit, it says:

"The State has provided a security for its own indemnity, to be managed in its own way by its officers and agents. Can such a security be taken out of the hands, at the instance of the creditors ultimately to be benefited? Can the State be charged as Trustee to those creditors and compelled to give up the trust fund by a Court which has no jurisdiction over it?"

That the creditors are ultimately to be benefited from the security in the hands of the State and that that is a trust fund is not questioned by the Court.

The decision in the case at bar in 109 *U. S.*, 446–457, does not affect the case as now made, but would seem to recognize a trust in behalf of plaintiff.

The Court say:

"On the hypothesis that the foreclosure by the Governor was valid, the trust asserted by plaintiff is vested

in the State as Trustee, and not in any of the officers sued."

This case, however, seems to square itself to the case of the *Railroad Companies vs. Schutte*. In that case the State of Florida issued bonds payable to bearer in aid of certain railroad companies, which companies in turn issued their bonds to the State of Florida, which were secured by a statutory mortgage upon their roads under the terms of the Act, upon default the Governor might take possession of, advertise and sell the property for lawful money of the United States, unless the State for its own protection became the purchaser, then the price could also be paid with such obligation of the company as the State should hold. The price, however, paid was directed to be applied to the payment and satisfaction of the bond issued by the State. If these were not due it was to be invested and held by the State as Trustee for the bondholder.

The Court say:

"In our opinion there is no occasion for applying here the doctrines of subrogation, because, in unmistakable language, the statute has made the mortgage of the company security for the payment of the obligations of the State."

Railroad Companies vs. Schutte, 103 *U. S.*, 118.

In the case at bar the statutory mortgage executed to the State is clearly security for the payment of the bonds of the railroad company. The State is required to seize the road upon the application of the bondholder. Without such application the Act is silent as to any authority to seize. The income derived from operations is specifi-

cally appropriated to the payment of bonds, and the sale is authorized to be made, not to reimburse the State, but for the interest of all concerned, and can be made in advance of payment by the State. So that it is a mortgage to secure the payment of the bonds issued by the railroad company to the holders thereof. This is made clear by the mortgage of June 22nd, 1890, confirming this lien.

THE BONDS ISSUED UNDER THE ACT OF 1870 STAND AS BETWEEN THE STATE AND THE HOLDERS THEREOF ON THE SAME BASIS AS THOSE ISSUED UNDER THE ACT OF 1866.

The title of that Act is:

"An Act to amend an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad and for other purposes."

Georgia Acts 1870, *p.* 336.

The Constitution of Georgia recognizes the title of an Act as a necessary and vital part of the Act.

Const. of Ga. 1868, *Art. III, Sec. IV, Par. V.*

The statute referred to enacts that the Act of 1866 "be so amended as to authorize the Governor to place the endorsements of the State to the extent of $3,000 per mile upon the bonds of said Macon & Brunswick Railroad Company in addition to $10,000, as recited in the Act of which this is amendatory."

Being an amendment to the Act of 1866, referred to therein, every provision of the Act of 1866 is a part of this Act of 1870. In fact, the Act and amendment make but one statute, and the provisions as to the mortgage and lien arising upon the endorsement by the State are

as applicable to the bonds endorsed under the amendment as to those endorsed prior thereto.

People vs. Sweetser, 1 *Dak.*, 308.
McKibben vs. Lester, 6 *Ohio St.*, 627.
Ludington vs. United States, 15 *Ct. of Cl.*, 453.

It is idle to discuss whether this endorsement could effect the bondholders then holding endorsed bonds; they are not complaining, and the State, who consented to this amendment, has paid them off in full with her own bonds.

See Georgia Acts 1877, *p.* 11.

The naked question is, was this a good act as between the State of Georgia, the Macon & Brunswick Railroad Company and these bondholders?

It must be conceded that, as between the State which passed the amendment, the railroad company which took the benefit of it and the bondholder who took the bonds issued under it, that the amendment is valid and gave his bonds the same security and lien on the property of the railroad company as the bonds previously issued enjoyed, unless there was some Constitutional obstacle which rendered the amendment of 1870 null and void under the Constitution of Georgia.

THE AMENDMENT OF 1870 WAS A CONSTITUTIONAL STATUTE.

If Constitutional prerequisites to the endorsement have not been complied with the State is estopped to now assert it against complainants.

1. The only attack made on the amendment of 1870 is that the power of the Legislature to pass the same was restricted by a Constitutional provision, which was enacted in 1868, some time after the Act of 1866 was passed.

This provision declares:

"Nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State, prior to any other debt or lien, except to laborers; nor any company in which there is not already an equal amount invested by private persons."

It is argued that the lien of the Act of 1866 was already on the property and also a lien to the second mortgagees, which were of necessity superior to the lien securing the bonds issued by the amendment of 1870, and that, therefore, the Legislature could not pass such Act.

Viewed from the standpoint of power, to enact, all that the Legislature was required to do, even if this provision applies to this case, was to make provisions for such prior lien. This it did, for this Act, being an amendment, all of the terms of the former Act of 1866 were written into it.

See Argument supra.

As to the lien of the bonds of 1866, it can not be supposed that the Constitutional provision meant that the lien reserved should be superior to another lien already reserved in favor of the State, but only to liens or other debts to persons other than the State. The reference to laborers clearly explains this. As to the second mortgage the question is not one of constitutionality, but merely, assuming that the constitutional provision applies to this case, whether the officers of the State saw to it that the

constitutional requirements were complied with. It would be a question of legality of action under the law, and not of constitutionality of the law itself.

Before the State's endorsement was given on the bonds under the amendment the trustees of the second mortgage executed a full release, recited to be made by the written consent of the bondholders for whom they were trustees, subordinating the lien of the second mortgage to that created by the State's endorsement on the bonds issued in 1870.

Transcript, pp. 14–15.

There is not a line of testimony impeaching this conveyance.

2. *The State is entirely estopped from claiming that the prior security required by the Constitution was not taken.*

The Legislature is only required to make provision. This it did by the provisions of the entire amended Act, reading the statute of December, 1866, and that of 1870 together.

The duty to see to the compliance with this statute rested on the Governor, who was designated and directed to endorse when "satisfied" that the Act was complied with.

His endorsement "by virtue of the authority" conferred by the Act carries a statement that the conditions precedent were complied with, and that the state of facts existed which rendered the endorsement valid in the hands of innocent holders.

Dillon on Mun. Bonds, p. 50.

Sherman County vs. Simons, 109 *U. S., p.* 735.

3. ***But the bonds of these complainants were purchased by them under these further circumstances of estoppel.***

The State of Georgia had raised a committee to investigate, hear evidence and report to her Legislature upon the validity of the bonds endorsed by her.

See Acts of 1871–'72, *p.* 14, *quoted supra.*

Upon the coming in of that report, after such hearing, the Legislature of Georgia, by joint resolution, approved by the Governor, solemnly affirmed the validity of the State's endorsement on these bonds.

See Acts of 1872, *p.* 518.

These complainants bought after the passage of this resolution and on its faith.

Transcript, pp. 3, 152.

The Legislature is required by the Constitution to see to it that the prior lien is required. The Legislature examines after the endorsement to see if the Constitution had been complied with. It enacts that it has been, and a purchaser buys on the faith of this legislative declaration. The State is forever estopped as against such purchaser.

An Act or Resolution of the Legislature estops the State.

Alexanders vs. State, 56 *Ga.*, 454.

After this resolution, a change of front by the Legislature, or a different ruling by the Court, would impair the validity of the contract.

Ohio Life Ins. Co. vs. Debolt, 16 *How*, 416, 432.

Golpke vs. Dubrique, 1 *Wall*, 175, 206.

Lee County vs. Rogers, 7 *Wall*, 181, 183–4.

City vs. Lamson, 9 *Wall*, 477.

4. *The clause of the Constitution above quoted has nothing to do with this Act of* 1870.

That clause is a specification of the terms upon which the Legislature should extend the credit of the State in first instance to a corporation.

In the case at bar the Legislature had, in 1866, extended the credit of the State to the Macon & Brunswick Railway Company to the amount of $10,000.00 per mile.

At that time there was no constitutional provision limiting or restricting the right of the State to endorse these bonds upon any terms she saw fit. The State's credit had been already extended to the Macon & Brunswick Railroad Company at the time the constitutional provision of 1868, above quoted, had been passed.

The naked question as to the applicability of this provision of the Constitution is whether it would prevent the State, in a case where it had already lawfully extended its aid to a railroad, and where there was a necessity in the opinion of the Legislature for the raising of more money in order to protect the State from danger of loss by reason of such previously extended aid, from endorsing the note or bond of such railroad in the success of which it was already largely pecuniarily interested, if, in the judgment of its Legislature, such course was advisable for the interest of the State. In this case it was conceded that at the time when the original aid was extended the State had the unquestioned power, under the Constitution then in force, to have made the second endorsement if she had deemed it to her interest to do so.

Under the Constitution of 1868 the General Assembly, unless restricted by the Constitution, had power to enact

any statute "which they shall deem necessary and proper for the welfare of the State."

Constitution of Georgia, Article 3, *Section* 5, *Paragraph* 1.

The presumption is in favor of a power of a Legislature of a State to pass any law, and the burden is upon those who assert the want of power to show it, beyond a reasonable doubt.

English on Inter. of Stat., Sec. 535.

Churchill et al. vs. Wallen et al., 68 *Ga. Ref.*, 681, 686.

Certainly, reasons dictating the enactment of a constitutional provision restricting the power of the Legislature from originally lending the credit of a State to aid a railroad enterprise would be wholly inapplicable to a case where the credit of the State had already been, at the time of the adoption of such Constitution, extended to a large amount, and the question of jeopardizing the interest of the State by a refusal to lend a much more limited additional sum confronted the General Assembly. In the one case, the State is acting purely to promote a work in which she is at the time in no way directly interested.

In the second, she is confronted with the danger of a direct pecuniary loss, and has, as a surety, a direct interest in the successful prosecution of its enterprise.

We submit that under such circumstances the constitutional provision as to lending the credit of the State in aiding any enterprise has no application, and the question of endorsing further bonds to aid in completing the work, in which the State is already directly interested,

as above stated, is one appealing alone to the legislative discretion of its power to pass all laws deemed by it necessary and proper for the welfare of the State.

A prohibition upon the Legislature to grant for the future is to be understood as relating to granting *de novo* and not the dealing with or enlarging the grants prior to the legislative prohibition.

In the case of Jones vs. Habersham the Legislature of Georgia, in 1870, amended the charter of the Georgia Historical Society, enlarging its corporate powers. By the Constitution of 1868 it was provided:

"The General Assembly shall have no power to grant corporate powers and privileges to private companies, except in such instances which exclude corporations, such as the Historical Society."

This Court ruled:

"The object is to take away from the Legislature and to vest in the courts under its direction, for the future, the creation of private corporations for literary, religious, charitable or other purposes, except those especially excepted; but not to prevent the Legislature from amending the charters of corporations already existing, and modifying and enlarging their powers, either by repealing former restrictions or otherwise.

"The Act of 1870 is, therefore, constitutionally invalid."

Jones vs. Habersham, 107 *U. S.*, 174–188.

BUT EVEN IF THE STATE'S ENDORSEMENT WERE INVALID AS AN OBLIGATION BINDING THE STATE TO PAY, THE ACT OF 1870 WOULD BE VALID TO THE EXTENT OF LETTING IN THE HOLDERS OF THE BONDS ENDORSED THEREUNDER TO THE BENEFITS OF THE STATUTORY MORTGAGE CREATED BY THE ACT OF 1866.

It has been already shown that the Act of 1866 and the amendment of 1870 must be read as one.

It has likewise been shown how the provisions of the Act of 1866 create a mortgage not alone for the security of the State, but also directly for the benefit of the bondholder.

The moneys derived from the operation of the road after seizure are directed to be paid to the holder of the bonds and coupons. The sale of the road being clearly contemplated to take place in advance of payment by the State upon its endorsement and the same to be conducted, not in the interest of the State alone, but of all concerned.

No provision of the Constitution prevented the State from making a direct donation to the Macon & Brunswick Railroad Company. The only restriction was upon the lending of the credit of the State. Clearly, the State, as between herself and the railroad company, could have renounced the benefit of the mortgage of the Act of 1866, and have permitted the Macon & Brunswick Railroad Company to have executed a mortgage thereon superior to any claim which she, after payment of the endorsed bonds, would have had.

If it be held that the endorsement under the Act is not binding upon the State personally, because of a failure to comply with the conditions precedent prescribed by the Constitution, still the Act is sufficient to let in the holders of bonds issued thereunder to the benefits of the statutory mortgage, and will operate as a waiver on the part of the State of her right to be reimbursed from the property of the Macon & Brunswick Railroad Company for moneys expended in re-

sponding to her endorsement on the first issue of bonds until the second issue of bonds shall have been paid out of the mortgaged property.

The first issue of endorsed bonds was paid by the State in 1877 by exchanging the same for her own bonds.

She then held the road, as we shall contend, in trust, first, to secure the payment of the $600,000 of bonds endorsed by her in 1870, and then to reimburse her her outlay in retiring the $1,950,000 of bonds endorsed under the Act of 1886. She was also liable upon said $600.000 of bonds, or if not liable, had, by the Act of 1870, at least consented that they should have the property pledged for their security under such circumstances as would make their claim superior to her right to reimbursement.

As has already been argued, the lien of the $600,000 of bonds upon said property was superior to her right of reimbursement.

"Where a surety obtains from his principal a mortgage to secure him against liability, the creditor is entitled to the benefit of such security; and if the surety include in the mortgage a debt due to himself as well as the indemnity against the principal's debt for which he is surety, as between himself or his voluntary assignee and the creditor, the latter is entitled to be first paid out of the proceeds of the mortgage.

"As a *quasi* trustee for the creditor in respect of the indemnity thus obtained, the surety is bound to pay over to him the first proceeds in preference to paying them to any of his own general creditors."

Ten Eyck & Brinckenhoff vs. Holmes, et al.,
3 *Sand. Ch.*, 438.

BUT, IN ANOTHER RESPECT, EVEN IF THE ACT OF 1870 AND THE ENDORSEMENT WERE UNCONSTITUTIONAL, SUCH INFIRMITY COULD NOT DEPRIVE THE BONDHOLDERS OF THE BENEFIT OF THEIR STATUTORY MORTGAGE.

In respect of this question the case at bar is like the case of Schutte vs. Railroad Companies, in which the precise question being made was raised, and the objection is completely disposed of by that authority.

Say the Court (p. 142):

"It is contended, however, that as the provision of the act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the Company is void also, and must fall. We do not so understand the law. Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every other case of statutory construction, all depends on the intention of the Legislature, as shown by the general scope of the law. To our minds it is clear, in the present case, that the object of the Legislature was not to create a debt which the State was expected to pay, but to aid the company in borrowing money on the credit of the State. As between the State and the company, the debt for the money borrowed was to be the debt of the company. If the State paid its bonds from its own funds the mortgage could be enforced to compel the company to make the State good for all such payments. If the State did not pay, then the creditors had their own recourse upon the mortgage. The State credit, so far as the State and the company were concerned, was only to aid the company in borrowing money on its own bonds. In any event, the company was bound for the payment of the entire debt when it matured, and its property was to be given as security. Under these circumstances it seems

to us that the unconstitutional part of the statute may be stricken out, and the obligation of the company, including its statutory mortgage in favor of the State bondholders, left in full force. *The striking out is not necessarily by erasing words,* but it may be by disregarding the unconstitutional provision and reading the statute as if that provision were not there. These bonds as State obligations were void, but as against the company which had actually put them out, they were good."

Affirmed in Supervisors vs. Stanley, 105 *U. S.*, 305–312.

Applying the significant language of this case to the case at bar, where the intent of the endorsement was precisely the same as that quoted above, if there is any unconstitutional provision for liability of the State by its endorsement, *it may be disregarded, and the statute read as though no such liability should exist;* but the statutory mortgage in favor of bondholders accepting the security upon the credit of the State is left in full force. When, therefore, the State denied its liability upon its endorsement, and announced its intention not to pay, the lien given by the statute to it, enured fully to the benefit of the bondholders to the same extent as though the statute had extended the endorsement of the State, *upon the condition that the bondholders should have a mortgage lien.*

NOTICE OF INTENTION TO COMMIT BREACH ON TRUST.

The statutory trust created by the act having been affirmed by the State, the State declared its intention to commit a breach of that trust, (*see the resolution of the State, Acts of* 1875, *p.* 371) by resolution instructing the Governor to sell the road upon such terms and for such

price as in his judgment might be consistent *with the interests of the State.*

No argument is needed to show that such instruction by a private trustee to his agent concerning a private trust would be an order to commit a breach of trust. Imagine a trustee for the benefit of creditors—himself a creditor—*ordering his agent to sell the trust property in the interest of him, the trustee.*

Here was notice to all the world that a breach of trust was intended, and from that moment all purchasers were put upon notice by this public act, of every succeeding step, and of the real facts, whatever they were.

The position of a State does not differ, in respect of the good faith required by good morals, from that of any other trustee, and the only distinction between the conduct of the State concerning the present trust and this declaration and order for an intended breach, and a sale conducted on the part of a private trustee, *is in the public nature of the declaration and instructions,* which became a part of the claim of title by which the present defendant holds.

Woodruff vs. Trapnell, 10 *How.;* 207.

There was also the difference in the helplessness of the *cestui que* trust as long as the State held the property.

It is doubtful if another instance can be found of a trustee for sale for the benefit of all concerned, deliberately announcing his intention to violate his trust, and to sell for his own benefit.

In Wormley vs. Wormley, 8 Wheaton, 421, the trustee was authorized to sell whenever in his opinion the land and property could be sold, and the proceeds advan-

tageously invested for the best interests of all concerned.

Of the execution of this trust, Judge Story says :

"The trustee had not an unrestricted authority to sell, but only when in his opinion the purchase money might be laid out advantageously for the *cestuis que* trust. It is true, the sale and the reinvestment had to be dictated by his opinion, which is an invisible operation of the mind. But his acts, nevertheless, are subject to the scrutiny of the law, and if that opinion has not been fairly and honestly exercised, if it has been swayed by private interests and selfish objects, if the sale has been at a price utterly disproportionate to the real value of the property, and the evidence demonstrates such facts, a court of equity will not sanction an act which thus becomes a fraud on innocent parties."

And again :

"In the judgment of the Court, the sale was a manifest breach of trust. It was in no proper sense an execution of the power. The power in the contemplation of the trustee was virtually extinguished. He sold not because he intended an advantageous investment, *but because he considered himself the real owner of the estate.* The very letter as well as the spirit of the power was, therefore violated, for the trustee never exercised an opinion upon that which was the sole object of the power itself—an advantageous reinvestment."

In the case at bar we are not driven to gather the intention of the trustee from the results of the sale. We have its expressed declaration, in advance of sale, that the judgment of its agent should never be exercised under the power of sale created by statute, *for the benefit of all concerned.* That judgment was ordered to be exercised only for *the interest of the trustee.* The truth was that the State did not intend to discharge any trust, but—just as the trustee in the case of Wormley—looked upon itself as the only party interested. That is made clear, not only by the other facts admitted, but by the

admission (Record, p. 150) that the State appropriated the earnings to its own use.

BREACH OF TRUST.

The undisputed facts show that the instructions of the Legislature were regarded by the Governor, and that the property was sold by him upon such terms and for such prices as was consistent with the interest of the State, and that it was not sold in such manner and at such time as in his judgment subserved the interest of all concerned, and that a breach of trust was thus committed by the State.

Facts that raise a presumption that a breach of trust was committed.

The record discloses circumstances from which a breach of trust will be presumed, subject, of course, to proof that the interests concerned were subserved.

These facts were:

1. The State instructed the Governor to sell so as to subserve its own interests. We have already shown these instructions.

2. By the resolutions of March 6th, 1875, the State, *uno flatu*, repudiated its own liability, as guaranteed, and gave such instructions as to terms as precluded the holders of those bonds from using them in the purchase on the usual equitable terms upon which holders of junior securities are permitted to bid in their own interests. The Act of 1866 had provided that the "judgment" of the Governor should control the terms of sale. The resolutions of 1875, after declaring that the State would not protect the bonds of 1870, instructed its agent in terms substituting its judgment for his and laying down terms

that indicated clearly that those unprotected bonds should not be recognized at all in the sale. More conclusive proof could not be afforded that in no event would the State execute the trust in favor of those bonds.

3. The proclamation of sale confirmed these instructions.

4. In the absence of the proof to the contrary, it will be presumed that the Governor complied literally with the instructions, and regarded only the interest of the State.

U. S. vs. Crussell, 14 *U. S.*, *p.* 1.

Davenport vs. Mason, 15 *Mass.*, *p.* 87.

1 *Ga.*, 3.	36 *Ga.*, 442.	45 *Ga.*, 414.
1 *Ga.*, 275.	39 *Ga.*, 22.	47 *Ga.*, 195.
6 *Ga.*, 188–491.	49 *Ga.*, 119.	60 *Ga.*, 51–482.
22 *Ga.*, 417.	73 *Ga.*, 105–620.	
32 *Ga.*, 111.	79 *Ga.*, 100.	

It is *the law of this case* that the Governor was not the Trustee, but that the State, through him, was in possession of the property, and that he was the agent of the State. It is therefore a matter of legal presumption that the agent as the legal officer of the State complied with the instructions given him by his principal.

Cunningham vs. M. & B. R. R., 109 *U. S.*, 446.

5. In point of fact, he did obey them and considered only the interest of the State, and not the interest of any one else concerned. He sold on such terms and at such time as did not subserve the interests of all concerned.

As to that fact, proof positive exists in his letter of March 24th:

"I think I will advertise the Macon & Brunswick property for sale on the first Tuesday in June next. I fear, however, that the time will not be as favorable as a later date would be, but I am weary of the road and the whole villainous business, and as the Legislature has indicated the 1st of June for the sale, I am inclined to conform with their wishes."

6. The State contemplated the sacrifice of the property, and prepared carefully to buy it.

Act of March 5th, 1875.

7. The admission of the answer establishes the fact that from the date of the seizure the State appropriated all the earnings to its own use, thus demonstrating that it regarded the property its own, and commenced *ab initio* a breach of trust.

Wormley vs. Wormley, 8 *Wh.*, 421.

8. The State did actually purchase the property at its own sale.

9. The State purchased the property at its own sale for one-fourth of its cost of construction. Before any bonds had been issued 120 miles had been graded and fifty miles finished. At the lowest possible estimate this was worth ..... $ 600,000

After that bonds were issued to

the amount of	$1,950,000	
	1,100,000	
	600,000—	$3,650,000
		$4,250,000

Making the whole cost of construction over $4,000,000, if the money went into the road. There is no evidence

to show that it was not so used. To hold that the money was otherwise used would be to assume such a fact in the face of the recitals of the Act of 1870. When that Act was passed all of the above expenditure had been made, except the last $600,000. We are free to assume that the road cost at least $4,000,000. There is no proof that this was undue cost. Ordinarily the trade and connections of a road make it of greater value than the mere cost of construction, and yet the sale was so managed that the State used the power that it tried to get, and bought in the whole property at its own sale, and at an unfavorable time, for $1,000,000. It is impossible for the complainant to show how this was brought about. It is not his duty to do so, and "it may be inaccessible to the eye of the Court." (Judge Wayne in Michoud vs. Girod). It is sufficient for the complainant to show a sale by the State and a purchase by the State at an unfavorable time for about one-fourth the cost of construction.

Suppose the facts above specified be applied to any other trustee than a State. Let proof be made that a guaranty corporation has guaranteed the first and second mortgage bonds of a road; that under the contract of guarantee it was provided that upon default the guaranty company should seize and sell the property of the road so as to subserve the interests of all concerned; that the guaranty company, upon default in the payment of of coupons, seized the road under that power; that three months before sale it expressly repudiated its guarantee of the second mortgage bonds, and announced its intention not to pay them; that at the same time it instructed

its agent in charge of the property to sell it on such terms and at such time as would best subserve its own interests; that at the same time it formally authorized its agent to buy the property for itself, if in his judgment it was about to be sacrificed; that at the same time it instructed its agent to receive payment in cash, or in first mortgage bonds, or its own bonds, and thus exclude the second mortgage bondholders from using their bonds to any extent in payment; that while this contract provided that the judgment of the agent should be used in the sale, it so instructed the agent as virtually to substitute its own judgment for his; that from the time it took possession of the property it seized into its own treasury all the net earnings of the property, and never accounted for a dollar to any person in interest; that the agent frankly announced that he thought the time fixed unfavorable, but was weary of the business, and would conform to the instructions of the guaranty company; that the agent did sell at the time instructed by the guaranty company, and on the terms instructed by the guaranty company, and did bid in the property for the guaranty company at one-fourth of the construction cost.

If these facts were in proof, would not any court of equity decree that unless the defendant had made clear and convincing proof that in *fact* the property had been so sold as to best subserve the interests of all concerned, a case of *fraudulent breach of trust* had been overwhelmingly established?

And the question then naturally arises, is there anything in the fact that the *State* was the *trustee* by whom these things were done, that changes the result and sanctifies that as right, which a court of equity would have taken to be a breach of trust, if done by anyone else?

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Davis vs. Gray, 16 *Wall, p.* 232.

SECOND BREACH OF TRUST.

THE PURCHASE BY THE STATE WAS A CONSTRUCTIVE FRAUD UPON THE BONDHOLDERS, AND IS SUBJECT TO THEIR DISAFFIRMANCE.

1. Attention has already been called to the Act of March 5th, 1875, authorizing the Governor to purchase property sold by the State. This Act has been relied upon by the defendant in this case as authority for the purchase by the State free of the ordinary rules of law governing purchases by trustees at their own sales. When this Act was passed, as has been formerly shown (*Brief, p.* 7), if a trustee purchased property of a *cestui que* trust, under a sale by the trustee, the purchase would be in constructive fraud, and passed no title at the option of the *cestui que* trust.

Worthy vs. Jackson, 8 *Ga.*, 236.

The result would have been that a purchase by the State at the sale by it as trustee would have been voidable at the option of the complainants.

It has also been shown by the Act of Legislature of Georgia of December 7th, 1858, that this decision of the Supreme Court was in 1875 as much a law of the State of Georgia as if passed by Legislative enactment.

Not only was this the law of Georgia, but by the general equity law administered in the Courts of the United States such a sale would have not only been voidable, but actually void.

Michoud vs. Girod, 4 *How.*, 503.

Wormley vs. Wormley, 8 *Wheaton*, 421.

In this respect the general equity law administered by this Court was more stringent than the general law of Georgia; but the general law of Georgia was equivalent in all respects to statute law of that State.

If, therefore, the State of Georgia was a trustee for these bondholders in the sale, it had power to buy the property at its own sale under the statute law of Georgia, but *subject* to the right of the bondholders *to disaffirm the sale;* and that is what has been done in this case.

2. Nevertheless, the defendant relied upon the Act of March 5th, 1875, to clothe the State with the power of purchasing at its own sale, free of the disaffirmance right upon the part of those concerned.

It will be noticed (*Brief, p.* 8) that the Act does not expressly give this power. It merely gives authority to the Governor to act for it and purchase—an authority of which he was not possessed before the Act was passed. Without the passage of this Act, therefore, at any sale made by it, as trustee, no official stood clothed by the State with the requisite authority to purchase property at its own sales. An inspection of the Act will show that the conferring of this power was all that the Act ac-

complished and no more. It did not refer to the existing law and repealed no part of it, and will not be held to have repealed that law by implication.

Ex Parte Crow Dog, 109 *U. S.*, 556.
McCool vs. Smith, 1 *Black*, 459.
U. S. vs. Walker, 22 *How.*, 299.
Galena vs. Amy, 5 *Wall.*, 705.
Henderson's Tobacco, 11 *Wall.*, 562.
Arthur vs. Homer, 96 *U. S.*, 137.
Chew Heong vs. U. S., 112 *U. S.*, 536.

In other words, the Act will be construed to the extent to which it goes and no farther. It enabled the Governor to buy, but did not repeal the existing law of the State providing that such a purchase should be subject to the right of disaffirmance. If this view be correct, the Act and the purchase by the Governor had no effect whatsoever upon the existing right of disaffirmance.

3. But it is contended upon the part of the defendant that such is not the construction to be given to the Act of 1875, and that it was intended not only to authorize the Governor to purchase, but to purchase for the State free of existing law.

If the Court should be of the opinion that this was the intention and effect of the Act of 1875, it is respectfully submitted that the Act of 1875 was an act impairing the obligation of contracts, contrary to the Constitution of the United States.

It is a familiar principle that the State of the law existing at the time of the making of a contract, or of the assumption of a trust, and affecting the rights of

trustees and *cestui que* trust, passed into and became a part of the trust contract and could not be varied by subsequent legislation. If that principle be true of parties generally, how much more emphatic when the trustee itself is the legislative power?

8 *Wh.*, 85.	2 *How.*, 608.	7 *Cr.*, 164.
16 *Wall.*, 514.	6 *How.*, 301.	4 Pet., 514.
103 *U. S.*, 367.	96 *U. S.*, 595.	10 How., 190.
1 *How.*, 311.	102 *U. S.*, 205.	

4. It may be answered that while contract or trust rights cannot be varied without impairing the obligation of contracts, remedies may be varied; and that the power of the State to buy was a matter of remedy.

This answer will not bear examination. When these bonds were issued under the trust contract, the law was that the trustee should sell for the interests of all concerned; and that in such sale he should not be an intended purchaser, with interests thus opposed to his duty as trustee, and temptations to serve himself rather than those who were to be protected by him; and that a purchase by him would be in fraud of all others concerned. These provisions were just as much parts of the trust contract as though written therein; and they thus established trust duties and rights, and have no similarity to remedies If the State had desired to become a purchaser in conformity to the statutory contract, it could have done so with ease by ordering its law officer to foreclose its mortgage lien in the Courts, after payment of the debt, as was done in several cases to be cited, and under such sale by a judicial officer it could have protected itself by purchase, without resort

to the extraordinary power reserved by the Act, which carried with it the duties and disabilities of trustees.

5. *The Act of* 1875 *is unconstitutional under the Constitution of Georgia, if varying the general law.*

If the Act of 1875 was intended by the Legislature, and had the effect of repealing the general law of Georgia so as to permit the State to purchase free of that general law, it is respectfully submitted that the Act was unconstitutional.

We have already shown by the decisions of the Supreme Court of Georgia in *Worthy vs. Jackson*, 8 *Ga.*, 236, that the law of Georgia in 1850 was that the purchase by a trustee at his own sale was voidable, and that by the Act of the Legislature of Georgia of December 18th, 1858, the decisions of that Supreme Court had become a part of the general law of the State as though enacted by statute.

Thus on the 5th day of March, 1875, there was a general law making the purchase of the trustee at his own sale voidable at the option of the *cestui que* trust, and this was a general law affecting private rights. The Act of 1875 was a special Act authorizing the State as an individual to purchase at its own sale.

"Laws shall have a general operation, and no general law, affecting private rights shall be varied in any particular case, by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person under a legal disability to contract is capable of such free consent."

Constitution of 1868 (*Code of* 1873, *sec.* 5018).

This Constitution was in force in 1875, and this provision of the Constitution has been in force in Georgia from 1865 down to the present time. When, therefore,

the Act of March 5th, 1875, was passed, there was a general law of the State of Georgia providing that purchases by trustees at their own sales should be voidable at the option of the *cestui que* trust. That this was a law affecting private rights there can be no question, and the privilege in this case of each bondholder was to disaffirm the purchase by the State at its own sale. But if the construction of the Act of 1875 invoked by the defendant be correct, an Act was passed by the State authorizing it as an individual to buy at a sale to be made by it as a trustee. The Act was not a general Act, but a special Act clothing the State of Georgia with power as an individual to purchase at its own sales, with such results as affected the purchase by no other trustee in the State. The Act was, therefore, special in its nature in favor of the State of Georgia as an individual, and could not be passed so as to exclude the right of disaffirmance of these complainants without their express consent in writing.

But it is respectfully submitted, as is hereinbefore shown, that the Act contemplated no such results, and was neither unconstitutional as respects the Constitution of the United States, nor unconstitutional as respects the Constitution of the State of Georgia.

RESULT OF BREACHES OF TRUST.

THE STATE HAVING BECOME THE PURCHASER AT ITS OWN SALE, THE LEGAL RESULT OF EITHER OF THE TWO BREACHES OF TRUST REFERRED TO WOULD NECESSARILY BE, THAT THE STATE HELD THE PROPERTY AFTER IT WAS BOUGHT BY IT AS A TRUSTEE FOR THE CREDITORS, WITHOUT RE-

GARD TO THE FAIRNESS IN ANY OTHER RESPECT OF THE SALE AT WHICH THE STATE PURCHASED.

Michoud vs. Girod, 4 *How.*, *p.* 557.

There can be no difference between the results attendant upon the two breaches of trust. In each case the trustee purchasing the property under the breach of trust held it as trustee, and the Court having jurisdiction of the trust property will administer the trust through its own officers.

It follows, therefore, that if this property was still in the possession of the State, and if the State was suable by these bondholders, a bill would lie against the State as a tortious trustee, and the trust estate would be taken from it and administered by the Court having jurisdiction.

But since this bill was filed the property passed from the State by sale through various purchasers down to the defendant, the East Tennessee, Virginia & Georgia Railroad Company, and the next subject of consideration is the position of that defendant toward the complainant.

PURCHASES FROM THE STATE WITH NOTICE OF BREACH OF TRUST.

Purchasers from a tortious trustee take the property subject to the same trust, if they have notice, actual or constructive, of the trust and of its breach.

Perry on Trusts, 217, 860, 506.
Mechanics Bank vs. Seton, 1 *Peters*, 299.
Duncan vs. Jaudon, 15 *Wallace*, 165.
Oliver vs. Piatt, 3 *Howard*, 333.
Even in Courts of Law: Kitchen vs. Bedford, 13 *Wallace*, 414.

NOTICE ACTUAL AND CONSTRUCTIVE.

Actual notice of the trust and of the intended breach by the State existed by the statutes already referred to on the statute book of Georgia, not one of which was ever repealed. Not only, therefore, by the ordinary rules of law concerning the effect of public laws as notice (Code of Ga., sec. 3815, 31 Ga., 67) is the present defendant bound by notice, but to presume that the purchasers from time to time of that road did not actually know of the existence and effect of those Acts, would be impossible. Upon the simplest inquiry into their chain of title they could not go back twenty years without coming upon the sale of the road by power of seizure granted by statute, and the purchase by the trustee and the breaches of trust, and the deed to the State and the construction cost.

But if all this was not actual notice, how could the circumstances have failed to put them upon inquiry? As was said by the Supreme Court of the United States in regard to a purchaser, in Oliver vs. Piatt, 3 Howard, 410:

"So that it is most manifest that Williams as a proprietor in the Port Lawrence Company, and as an agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under the circumstances, he chose to remain in *indolent ignorance or indifference* to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestui que* trust. Under such circumstances it is difficult to conceive how he can claim protection as a bona fide purchaser for a valuable consideration, without notice, against any title paramount to

that of Oliver, which attached itself as an *unextinguished trust* to the tracts."

Further, it was thoroughly known to the world by the public resolution of 1875 and the action of the executive thereunder, that this property was to be sold in violation of any rights which the holders of bonds issued under the amendment of 1870 had therein. The Trustee had expressly repudiated the trust by formal Legislative declaration and was selling in derogation thereof, and intended to apply the proceeds of the property for purposes other than the payment of any part of the bonds issued under said amendment.

In such case the purchaser would take the property charged with such trusts.

See Duncan vs. Jowdon, 15 *Wal.*, 165.
Cook vs. Tuyis, 18 *Wal.*, 332.
Kitchen vs. Bedford, 13 *Wal.*, 413.

Therefore, when the State purchased at her own sale in 1875, she being the endorser upon all these bonds and liable to pay, regardless of what the property brought, and really, as shown, paying no purchase money therefor, but simply foreclosing the equity of redemption of the railroad company, she took the title conveyed to herself by herself, charged with all the trusts originally resting upon it.

A purchaser under a quit-claim deed is not an innocent purchaser for value, but takes subject to all equities.

Oliver vs. Piatt, 3 *How.*, 333, 495.
May vs. LeClaire, 11 *Wall.*, 217, 232.
Villa vs. Rodriguez, 12 *Wall.*, 333, 339.

As will be hereinafter shown, the deed from the State operates purely as a quit-claim deed. The Governor was not authorized by the Act to warrant the title, and his conveyance simply amounts to a quit-claim.

"See Argument, post."

The deeds from the Macon & Brunswick Railroad Company to the Cincinnati & Georgia Railroad Company, and from it to the East Tennessee, Virginia & Georgia Railroad Company, were without warranty of title, and referred in terms to the deed from the State to the Macon & Brunswick Railroad Company, and the Act under which it was made.

They operated purely as quit-claim deeds.

Transcript, pp. 77, 88, 93.

The foreclosure deed and the deed to the East Tennessee, Virginia & Georgia Railroad Company were purely quit-claim deeds.

Transcript, pp. 127, 136.

"Deeds given by public officers belong to the class of quit-claim deeds."

Boone on Real Property, sec. 324 *and cases cited.*

"The purchaser of the legal title, having notice that the estate is affected by other interests than those of the vendor of that title (as of the existence of a secret trust), is bound to inquire into the extent and terms of those interests."

Sergeant vs. Ingersoll, 15 *Penn. St.,* 343.

And to the same effect see

Hiser vs. Mill, 13 *Vesey,* 114.
Smith vs. Law, 1 *Atk.,* 490.
Taylor vs. Stibbert, 2 *Vesey, p.* 440.

Circumstances if sufficient to put a purchaser upon inquiry, leading to the truth, are good notice of the ultimate fact to be established.

Vattier vs. Hinds, 7 *Peters*, 252.

As before stated, the State undertook here to sell this property as her own, and not under the power contained in the Act of 1866. The purchaser cannot support the sale, if otherwise invalid, on the theory that she might have sold validly in accordance with the Act of 1866, where it appears that she did not do so.

Witnowski vs. Stubbs, 91 *Ga. Reps.* 440, 442.

At the time of the sale, in 1880, the existing Constitution of the State showed that it was the purpose of the State not to apply the proceeds of the road to pay these bonds, but that these proceeds had been already diverted to the payment of her own bonded debt.

Const. of Ga. (1877), *Art. VII., Sec. XIII., Par.* 1.

See this paragraph quoted in defendant's answer.

Transcript, p. 74.

LIS PENDENS.

Not only did this form of actual and constructive notice exist, *but this very suit was in existence against the debtor and trustee before the trustee had parted with the property; and all these facts were alleged therein.*

The property was in that suit clearly pointed out as trust property in the hands of the State, liable for these debts; and while the State declined to be sued and refused to admit the jurisdiction of this Court, that

refusal in no wise changed the nature of the trust or discharged the property from it. It simply suspended the power to sue until a purchaser with notice, capable of being sued, was brought before the Court. Such a purchaser of property, *pendente lite*, is fully bound, as was the original trustee.

County of Warren vs. Marcy, 97 *U. S.*, 96.
Union Trust Co. vs. So. Inland Nav. & Imp. Co., 130 *U. S.*, 565.
Titlon vs. Cofield, 93 *U. S.*, 163.
Whiteside vs. Houston, 110 *W. S.*, 296.
Drew vs. Norberry, 9 *Irish Eg.*, 176.
Scotland Co. vs. Hill, 112 *W. S.*, 183.
Ill. Cent. R. R. vs. Furrell, 110 *U. S.*, 296.
Perry on Trusts, 223.

"Where property passes to the State, subject to a specific lien or trust, created by law or contract, such lien or trust may be enforced by the Courts whenever the property comes under that jurisdiction and control. Thus, if the property held by the government covered by mortgage held by the original owner, should be transferred to an individual, the jurisdiction of the Court to enforce the mortgage would attach as it existed previous to the acquisition of the government."

The Siren, 7 *Wallace*, 158.
Chamberlain vs. St. Paul R. R. Co., 92 *U. S. p.* 306.

Such was the status of the case at bar. Although the property, while in the hands of the State, was charged with this trust created by statutory contract between the State and the bondholders, the trust was not enforceable, because the property, being in the possession of a

nonsuable trustee, could not be brought under the jurisdiction of the Court for administration; but just as soon as it passed into the hands of suable parties the Court could exercise its rightful jurisdiction, and could enforce against the new trustee the trust contract which it had no power to enforce against the old.

SPECIAL DEFENSES.

To the position of the complainant that the State held the railroad property as a trust; that it purchased the road in breach of trust, and that the purchasers, including the present defendant, all took with notice of the breach of trust, the defendant sets up various special defenses. We will examine them in detail.

I. *The defendant says that the Act of* 1870 *was unconstitutional.* To this we have replied:

1. That the endorsement was constitutional.

2. The trust lien in favor of the bondholders existed without reference to the constitutionality of the Act.

The unconstitutional statute if any there was, has no bearing or effect upon the fact of express reference by the State in that Act to complainant's bonds as bonds or debts concerned in that sale, which the State, as trustee, had power to make under the Act of 1866. Constitutional or not, let the Act be, these are debts of the road, not denied by the debtor, and pointed out by the State as obligations concerned in the provisions of the Act, under which the State contracted, that, whenever it should seize and sell, it it should do so in such time and manner as would best subserve the interests of all concerned.

3. The debt of the complainant so pointed out by the Act of 1870 as concerned in the sale, was one for which

the State had actually endorsed, receiving therefor a statutory mortgage, which would be void on the payment of the debt by the company, and which mortgage, therefore, under the case of Schutte, enures to the benefit of the creditors, whether the endorsement was constitutional or not. *Strike out so much of the statute as made the State liable to pay, and there would still remain a statutory mortgage in favor of the creditors.*

II. *The answer sets up that there was no legal waiver of the lien of $1,000,000 bonds. Concerning this defense it may be answered briefly:*

1. That the trustees under the mortgage filed a waiver reciting the consent of the holders.

2. That the provision of the Constitution being a negative, and dependent upon facts capable of proof before the Executive of the State, his *imprimatur* upon the bonds conveys a presumption that such proof was duly made before him at the time.

3. *The answer avers the bonds to be null and void, because of the unconstitutionality of the endorsement.*

This is a non-sequitur.

4. *It admits the appropriation of earnings by trustee while in possession, without any accounting; but holds that it was morally discharged by the fact that its liability for interest exceeded the net income.*

This breach of trust on the part of the State is one for which the State, and not the defendant, was liable; and it is not contended that the defendant is so liable. But as showing the intention upon the part of the State to treat this property as its own, and not in pursuance of its trust, the omission is significant to conclusiveness; and the fact that the interest due and paid by the State

exceeded the income furnishes no answer to such proof of tort by the trustee.

Wormley vs. Wormley, 8 *Wh.*, 421.

5. It sets up the lease to Couper of 13th of January, 1880, and other proceedings, and the various transfers down to this. *Each of these purchasers took with actual and constructive notice. The nature of that notice has already been presented.*

6. It avers the sale by Fink, Receiver, July 1, 1886, and the purchase at that sale by persons who transferred to the present company (p. 18).

That sale gave no better title to the purchaser, so far as these bondholders are concerned, than any private sale, as they were not parties to, or represented in any manner, in the proceedings which resulted in the decree of sale.

Because—

1. The decree is especially careful in saving the rights of prior mortgage creditors not before the Court. The road was not sold free of liens.

Decree of Foreclosure, Record, pp. 259, 261, 264. Marginal

2. As usual in judicial sales, only the title of the defendant in that case was ordered sold.

Decree of Foreclosure, Record, pp. 266–267. Marg

And so was sold.

Order of Confirmation, Record, p. 291. Marg

This is the rule of law, and purchasers must satisfy themselves of the title sold.

Williamson vs. Berry, 8 *How.*, 548.

I quote:

"We find the answer to our inquiries in the long experience and practice in chancery. In any sale under decree or order in chancery the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order."

Such is also the statute of Georgia, not that it could control the sale, but as evidence of accepted law.

Code 2,622.

3. The rule of law and equity is equally familiar, that persons claiming rights against property sold under decree, who are not parties or represented in the proceedings, are not bound by the judgment or by the sale under it.

Brooklyn vs. Ins. Co., 99 *U. S.*, 362.

Penoyer vs. Neff, 95 *U.S.*, 714.

4. If that is true of ordinary cases, where parties are simply not represented, how much more emphatic as to parties who had already commenced their litigation to enforce their lien upon the property sold?

If that is true of ordinary cases, when parties are simply not represented, how much more emphatic as to parties who would not have been permitted to intervene in the case of the Central Trust Company if they had so desired, and who could not have shared in the distribution?

And such was our case.

It was expressly decided by the Supreme Court that in a suit to foreclose a mortgage upon a whole connected

property a prior mortgage of a part could not intervene or participate in distribution.

Woodworth vs. Blair, 112 *U. S.*, 8.

In the above case the intervening mortgagee's petition was dismissed without prejudice, so that she stood just as though she had not intervened.

From these considerations it would follow that the purchasers at the Fink sale stood in no better case as to this prior trust on the property than that of any private purchaser with notice from one with notice. It may be pointed out here that at this sale, just as in every sale of the road, every party, the last owner, the Central Trust Company mortgagee foreclosing, and the purchasers had the identical notice, actual and constructive, of this prior trust and of its breach, that any intermediate purchaser had.

8. *It sets up a prescriptive title from* 1875, *when the State purchased* (*p.* 20).

There is no prescription or bar of limitation against a *cestui que* trust in cases of even constructive fraud, or breach of trust, short of twenty years.

Boone vs. Chiles, 10 *Pet.*, 224.

Michoud vs. Girod, 4 *How.*, 513–561.

Wormley vs. Wormley, 8 *Wh.*, 421.

If that is true in such cases, how much more so when the *cestui que* trust is protected by a statutory mortgage and by *lis pendens?*

9. *It alleges laches of the complainant in not having made the various purchasers parties to the pending suit* (*p.* 21).

That defense is but another form of words for the prescriptive title. Time of possession by defendant is the same thing as the delay of the complainant. If the purchasers were, as they all unquestionably were, purchasers with notice, that was sufficient to bind them as trustees, and no further notice was necessary.

Aside from any other notice, the doctrine of *lis pendens* effectually dispenses with the necessity for new parties, unless the complainant so chooses. We respectfully submit that the *laches* of the *cestui que* trust which would discharge a purchaser with notice would be only such acts upon the part of the *cestui que* trust as would estop him—acts contrary to good faith—acts upon which the purchasers would be entitled to rely as a waiver of his rights—acts to their injury. The question is not what the defendant has done to his own injury, but what has the plaintiff done? Undoubtedly such acts of omission as silence, while the defendant spent money, with notice to the plaintiff. may take the place of positive acts. But none are alleged and none proved. *On the contrary, the plaintiff placed his wrongs at once on the record of the Court below with a proceeding against persons whom the State hastened to proclaim, by demurrer, admitting the facts,* both there and in the Supreme Court of the United States, *were itself and non-suable,* and that the *State* was the party *liable in respect* of the allegations of the bill against those persons, and not those other persons. So the Supreme Court decided, and from the time of that decision *until the amendment was filed and the present party proceeded against,* there *was no change* in the ownership of the property, except by the receiver's sale (and subsequent transfer), to

which the complainant was not a party, and to which he could not have been admitted.

Bennett on Lis Pendens, 173.

10. *It affirms the novel ground that no breach of contract trust can be imputed to a State.* There is no such law in existence in this country. All that can be said is that a State is not suable; but that failure does not protect persons dealing with the State and taking trust property with notice of breach. The moment that the ownership of the State ceases, the liability of the new party to suit commences.

Chamberlain vs. St. Paul R. R., 92 *U., S.*, 306.

An excellent illustration of the fact that breach of trust can be imputed, as well to a State as to any person, is to be found in Curran vs. Arkansas, 15 How., 304, and Paup vs. Drew, 10 How., 218.

In that case the State of Arkansas was really the Bank of the State of Arkansas, being its sole stockholder. It appropriated by statute the assets of the bank, which were in equity, a trust fund for creditors to its own use. By its Constitution it was a suable State, and the Supreme Court held the conversion to be breach of trust, and enforced the trust. Now, the only difference between that case and the position in 1875, was the suable character of the State. So far as concerns the position taken, of freedom of a sovereign State from imputations of a breach of trust, it will be seen at once that no such immunity was maintained.

It may be safe for a State non-suable, as Georgia is, to commit a breach of contract trust; but it is equally

safe to assume that the courts of this country will never hold that purchasers from the State will be protected by the non-suable character of the State.

Suppose the State tortiously took possession of a citizen's property. While in possession of the officials of the State, suit against them could not be maintained, as is shown by this case, and by the case of Madrazo vs. Georgia.

But let a purchaser take that property from the State; the courts will not be slow to vindicate that title which the original owner never lost.

And so, if this property was charged with a contract trust, or with a trust debt secured by statutory mortgage in the hands of the State, while there the trust and the lien may not be enforceable. But the very essence of the case is that it was so charged, and was never discharged.

When any purchaser took the property with notice of that incumbrance, when and by what subtle process was the trust and the lien discharged? If the State had purchased property covered by a mortgage, the lien would not have been lost, though the right to enforce it might have been suspended; and it would have been enforceable against a purchaser. And if this is the fact, where there was simple purchase by the State without any wrong done by the State to the creditor, are the case and right changed by the additional circumstance that the State actually did a wrong to the unfortunate creditor?

It is presumable that the answer had some reference in this contention to the case of *Chamberlain vs. St. Paul;* but that case supports no such theory.

There, the debt was primarily of the State.

Here, it is primarily of the road.

There, the State purchased under judicial foreclosure.

Here, it bought under power of seizure at its own sale.

There, no breach of trust was alleged.

Here, the breach of trust is admitted by this contention.

There, the trust was only the equity of a creditor to claim the benefit of a security, under principles of natural justice, and not a legal right arising out of any positive law or agreement between the parties.

Here, it is not a mere equity, but an absolute right of a *cestui que* trust to have the trust property sold for the benefit of himself as a mortgagee, as well as others, under a statutory contract of the trustee, as formal and as binding as though made by deed and executed by the parties.

Say the Court in *Barings vs. Dabney*, 19 *Wal.*, 1:

"The creation of this trust in favor of the bondholders, if valid, was a contract with them."

11. *It insists that if we are right it would leave the State liable to the defendant; that the claims of the State against the road would be revived, and that this Court, therefore, would have no jurisdiction to administer the trust.*

So far as the liability of the State to the defendant is concerned, that is not the complainant's affair, and it would seem immaterial to the Court whether the State is liable to the complainant or to the defendant.

But the remainder of that portion of the answer can scarcely be serious.

1. If this Court has jurisdiction over the present parties and the property, that jurisdiction will not be lost, because she may prefer claims in this case as a creditor.

The Court will administer the trust, and the State will make known her claims when she has any desire to have them adjudicated.

2. If the State was a tortious trustee she can claim nothing in respect to her improvements, betterments, and the payment of her endorsement.

Railroad Co. vs. Soutter, 13 *Wall.*, 517.

Hughes vs. Edwards, 9 *Wheat.*, 489.

3. The possible claims of the State are no protection for the defendant. If the property is resold the State will not lose, for she sold to the purchasers with notice, *without warranty.*

12. *The State is said to be an indispensable party.*

Undoubtedly it was such when this case was decided by the Supreme Court, for the reasons stated in that decision, not one of which is true now.

But for the very reasons given in that case the jurisdiction of the Court is now unquestioned.

See 109 *U. S.*, 451.

The rule in equity undoubtedly is, that all persons interested in the object of a suit must be made parties. Such rule, however, is one adopted by Courts of Equity often, in contradistinction to the rule of the Courts of Law, and is designed to aid justice. To this rule, therefore, the Courts of Equity have always admitted exceptions in order that in the observance of its letter they might not contravene the principle upon which it rested. In the Courts of Equity of the United States, the impossibility of carrying out this rule in all cases has been, from the limited territority over which each court has jurisdiction, and the peculiar nature of our government,

more frequently observed; and rules of equity and construction of the Courts have sought in all cases to modify this as an inflexible mandate, and gauge the scope of its action entirely by the principle on which it rests.

The 47th Rule in Equity reads as follows:

"In all cases where it shall be made to appear to the Court that persons who might otherwise be deemed necessary parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the Court or incapable of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may, in their discretion, proceed in the case without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

The rule is about the same in its terms as the Act of Congress of 1839 on the same subject, and on that Act and this rule the Supreme Court of the United States have often ruled, sometimes refusing to entertain jurisdiction in some cases when the absentee was not a party, and at other times assuming it. It is respectfully submitted that a careful analysis of those cases will demonstrate their perfect consistency to the great principle underlying the rule, and will show that this cause can proceed without the State of Georgia as a party.

The State was once virtually a party to the cause and pleaded her exemption from suit, and thus on her own prayer has been discharged from the cause.

Now, the only interest that the State has in this suit is by reason of the fact that she was the original trustee and vendor of the trust property to persons from whom the defendant acquired it. The defendant's contention is therefore reducible easily to the proposition

that the State is a necessary party to any suit against any person for property once held by and sold by the State; and being such necessary party, no suit can ever be brought for that property which involved her power to sell.

Hence, to hold that the State must be made a party would be to defeat justice.

The reports of the United States Supreme Court are full of cases in which the Court proceeded with causes in which States had real interests—not such a possible eventual interest as that of Georgia in the case at bar.

Very like the case at bar was the case of *W. U. Tel. Co. vs. W. & Al. R. R. Co.*, 91 *U. S.*, 283, in which the Court proceeded to adjudicate the rights of lessees from the State to property received by the State from the complainant. Yet the State was not a party to the cause.

The case of the *United States vs. Peters*, 5 *Cr.*, 115, is conclusive.

The principal, as stated by the Supreme Court in *Mechanics Bank vs. Seton*, 1 *Pet.*, 306, is—

"It is a well-settled rule that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree."

2 *Mad. Ch.*, 184, 3 *P. Wil.*, 310 *N. I.*
Also see The Siren, 7 *Wall.*, 15.
The Davis, 10 *Wall.*, 15.

As examples of the cases in which the United States Courts have consented, and again declined to grant relief in the case of an absent party, the following will serve:

In the case of Georgia vs. Jessup, 106 U. S., 458, a foreclosure was proceeding against property concerning which the State made known the existence of certain tax liens, and prayed certain rights, without making herself party to the proceedings. Yet the Court, though admitting the liens of the State, decreed finally in the cause.

In another case a bill was brought by a tenant in common to have decreed a title. He did not make his cotenants parties. Marshall, C. J., for the Court, said:

"Courts of Equity require that all the parties concerned in interest shall be brought before them that the matter in interest may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion."

"In addition to these observations, it may be proper to say that the rule which requires that all parties concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States is not applicable to all. In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person in interest before the Court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the Court cannot reach, as if such party be resident of some other State, ought not to prevent a decree on the merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

Elmendorf vs. Taylor, 10 *Wheat*, 152, 166, 167, 168.

And this case, it will be observed, was before the Act of 1839.

Also see Mallow vs. Hinde, 12 *Wheat*, 193.
McComb vs. Board of Liq., 2 *Woods*, 48, 53.
Dodge vs. Woolsey, 18 *How.*, 331.

State Bank of Ohio vs. Knoop, 16 *How.*, 369.
Osborne vs. Bank of U. S., 9 *Wh.*, 738.
Jefferson Branch Bank vs. Kolly, 1 *Bl.*, 436.
Swasey vs. N. C. R. R. Co., 1 *Hughes*, 17.
Barney vs. Baltimore 6 *Wall.*, 280.
Horn vs. Lockhart, 17 *Wall.*, 570.
U. S. vs. Peters, 5 *Cr.*, 115.
Bank of U. S. vs. Wister, 2 *Pet.*, 318.
Young vs. Montgomery & Eufaula R. R. Co., 2 *Woods*, 606.

In *Davis vs. Gray*, 16 *Wall.*, 203, the Court said:

"Where the State is concerned, the State should be made a party if it can be done. That it can not be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State in all respects as if the State were a party to the record."

Board of Liq. vs. McComb, 92 *U. S.*, 531.
Lee vs. U. S., 106 *U. S.*, 196.

But that announcement is far beyond the case at bar. In this case the State has parted with her title and interest in the property; and hence she is not even directly affected by the decree sought. She can only be affected, if at all, by the future course of the defendants in consequence of the decree sought; and *non constat* that they will ever seek any recourse to her. At any rate, these complainants do not. < See p. 91. >

13. *The defendant contends that the State having paid the first series of endorsed bonds to the amount of* $1,950,000, *the lien of the State to that extent would be revived should the State be held to have purchased in breach of trust.*

We respectfully submit that this result would not follow.

If there was a breach of trust through which the State purchased, while the sale was valid as between the State itself and subsequent vendees, it was invalid as to the complainant, and did not relieve the property from the lien of the statutory mortgage. The State got no benefit from it as against the complainant, nor from its payment of the first bonds; neither did any vendee from it with notice derive any benefit as against the complainant. For, as was said by Mr. Justice Bradley, in R. R. Co. vs. Soutter, 13 Wall., 523:

"The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustees and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that clause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a Court of Equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner chooses to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, 'He that hath committed iniquity shall not have equity.' And various illustrations of it are furnished by the books.

"But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the LaCrosse & Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By

satisfying these creditors they could have kept the property and their title would have been good as against all the world. The property was theirs; but by reason of the fraudulent sale was subject to the encumbrance of the debts of the LaCrosse Company. This was the legal effect of the decree declaring their title void. Therefore, they were in fact paying off an incumbrance on their own property when they paid into Court the money which they are now seeking to recover back.

"They are wrong, also, that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law. They mistook the legal effect of transactions of which they were chargeable with notice. They were the persons for whose benefit the purchase was made, which was declared to be fraudulent. They were the principal defendants in the creditor's bill, upon which this decree was rendered. All the evidence in that suit had been taken when they made the payment in question. The cause was pending, on appeal, in this Court. There was not a fact, therefore, of which they were ignorant. They had full and actual notice of all the transactions, and all the evidence on which the decree was ultimately founded."

It does not follow, therefore, that if the sale was invalid, the first mortgage lien is revived, or that the present holders are subrogated to it. Paid off by the State after a voidable sale, it died and there was an end of it.

And so of any improvements. The State and its vendees held the road, used it, and pocketed the profits; so that by the most liberal construction of the rights of a purchaser from a tortious trustee with notice, neither the law, nor pleadings, nor proof, justify any decree in favor of the defendants for debts paid or betterments made.

COMMENTING ON THE POSITIONS OF THE APPELLEE IN THE BRIEF FILED IT WILL BE NOTICED:

1. As to the point (on page 13) that *Wood vs. The M. & B. R. R. Co.*, 68 *Ga.*, 539, has any bearing upon this

case, examination will show that it has not. That case was one of outside parties, holders of cemetery lots, attacking the title of the road after its sale by the State. As to third persons, the title would be good; but title may be perfectly good as to third persons, yet the sale void as between the trustee and the *cestui que* trust.

See R. R. Co. vs. Soutter, 13 *Wall.*, 523.

"But the complainants were wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the LaCrosse & Milwaukee Railroad Company. In other words, it was only voidable—not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good as against all the world."

2. As to the point of the defendant that no suit can be brought attacking the title of a State after conveyance by the State (pages 19 and 20), that position is not maintainable. The appellee goes very far, and produces no authority in support of its contention. Suppose a State were to seize and confiscate property; while in its possession the State could not be sued, but where is the authority to support the position that the real owner could not subsequently assert his title against the purchaser from the State? The appellee does cite *Christian vs. Atlantic & North Carolina R. R. Co.*, 133 *U. S.*, 233, but that authority does not support his contention. In that case the State was in possession and ownership of the property which the complainant sought to subject.

3. The complainants are not in the dilemma specified by the appellee. There was a sale, valid as to third parties, but invalid as to the complainants. That is a frequent case, an instance of which has been cited in the *R. R. Co. vs. Soutter.*

4. As to the point that the State is an indispensable party, because it is charged with the breach of trust, this contention would be true if the property were still in the possession of the State. But the State having sold to purchasers with notice, the purchasers become the trustees in place of the State, and are chargeable and suable. The contention seems to be that the greater the wrong done by the State the greater the impossibility of suing parties purchasing from the State the fruits of that wrong.

5. As to the appellee's sixth point, (page 49), we have never contended that the State did not have a valid power of sale. That it did have; but our contention is that the power of sale by it as trustee was exercised *in breach of trust, for its own benefit;* and that therefore it had no effect as against the *cestui que* trust.

6. We do not contend that the State of Georgia did not have the power to purchase. It did have that power; but being a trustee as well as a creditor, it could exercise that power only in pursuance of its duty as trustee, and in subservience to the general law of the State; and could not so purchase as to get rid of its obligation as trustee and the disaffirmance right of the bondholders.

7. The appellee contends that we are called upon "to do equity" if we would have equity; and that the equity incumbent upon us is to redeem. This position has been already answered by us if the principles in *R. R. Co. vs. Soutter* have any application. And the cases cited by the appellee have no bearing upon a case of purchase by a tortious trustee and of purchasers from that trustee with notice of the breach of trust.

15. It is difficult to see how we have been guilty of laches. We have dealt with that on page 41 of our

Brief. The record shows that the State bought the property at its own sale in June, 1875; that while it was still in possession of the property, in 1877, the present bill was filed; that it went to the Supreme Court in October, 1879; that it was decided there December, 1883; that the mandate was returned October, 1885; that leave to file the supplemental bill was granted in December, 1886; that the bill was originally against the Macon & Brunswick Railroad Company, the officials of the State of Georgia, the First National Bank of Macon, and John H. James; that the bill was dismissed only as to the officials of the State of Georgia; that while the case was in the Supreme Court, and on the 13th day of January, 1880, the road was leased by the State to Couper and others, and that various transfers were made until the 30th day of December, 1881, when the East Tennessee, Virginia & Georgia Railroad Company purchased; from that time there was no change in the title until the 28th of June, 1886, when it was sold to the persons who organized as the present defendant. These persons purchased from a receiver appointed in a bill filed on the 7th day of January, 1885, before the mandate was returned from the Supreme Court. As is elsewhere shown by the brief, we could not have intervened in that case, and were never made parties to it; but the property having been thus sold by the receiver on June 28th, 1886, the complainants within six months thereafter, on December 30th, 1886, filed their supplemental bill and brought the purchasers within the jurisdiction. In this state of affairs, how can *laches* be imputed?

CHARLES NEPHEW WEST,
of Counsel for Appellants.

[*Accidentally omitted from Brief, page* 85.]

If the State were a party she would not be bound by any warranty and the Defendant has no right of action, either at law, or in equity, against the State of Georgia in the event complainant is successful.

The authority under which the Governor sold this property to the Defendant, the Macon & Brunswick Railroad Company, is found in the Act of 1878 and 1879, above quoted.

Under the Act the lessees were formed into a corporation known as the Macon & Brunswick Railroad Company, and were given an option to purchase the Macon & Brunswick Railroad for the sum of $1,125,000.00 under the restriction imposed by said Act.

The entire authority of the Governor in the event said option was exercised was to "transfer to said lessees all the rights, privileges and franchises of the State in and to the Macon & Brunswick Railroad track, building, shops, rolling-stock and all other things attaching to said Macon & Brunswick Railroad.

Georgia Acts 1878, pp. 115-120.

"In this State there is no implied warranty title to land in the sale of it."

McDonald vs. Beal, 55 Ga., 288-294.

"It is a settled rule not only in this State, but in all the States and in England, that such public agent and only such powers as are granted to them; that they take nothing by implication and that the law granting their powers is to be strictly construed: 13 How., 81; 3 Kelley, 31; 1 Kelley, 561; 6 Wend., 85; 27 N. Y.; 21 Penn., 22; Cooly's Con. Lim., 196-7 and note."

Wright et al, vs. Nagle, 48th Ga., 390.

"It may be added that the Crown in selling land enter into covenants for title."

Dean's Prin. of Conv., p. 359.

"The Commonwealth does not warrant title."

Rawel on Cov. for Til., p. 52.

"The State does not warrant title granted by her."

3 Head., 113.

"An agent employed to sell without express authority to warrant cannot give a warranty which shall bind the property unless the sale is one which is usually attended with warranty."

1 Parson on Contract, p. 60.

"An agent with express power to sell has no implied authority to warrant where the property is not usually sold with warranty."

36 N. Y., p. 79.

"Public officers when selling property are not authorized to bind either the estates or principals whom they represent by any covenant of warranty."

Worthy vs. Jackson, 8 Ga., 236.

"The agent in order to bind his principal to make a warranty title to the property sold must have the authority of his principal so to bind him."

Wynn vs. Smith, 40 Ga., 457-466.

"A deed made by an agent containing unauthorized conditions and stipulations is void as to them but convey such title as the agent is authorized to make."

Humphrey's (Tenn), 283.

7 Ga., 179.

Story on Agency, Sec. 201.

Comyn's Digest (Attorney), 15.

"A quit-claim deed does not pass any more title than the grantor has, and does not give one who claims under it the rights of a *bona fide* purchaser without notice. If, therefore, one take such a deed and pay a consideration for it and the title fails, he has no remedy against his grantor in the absence of fraud on his part."

3 Wash. on Real Prop. (4th ed.), pp. 356-357.

"The deed from the State, therefore, operates solely as a quit-claim. Defendants have no right against her in event of failure of title, and she is not only not a necessary but would be an improper party to the cause."

156-400

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CLERK

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No. 388.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1893.

GEORGE A. CUNNINGHAM AND JOHN P. BRANCH, APPELLANTS,

vs.

THE MACON & BRUNSWICK RAILROAD COMPANY, ET AL.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

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STATEMENT.

On December 3rd, 1866, the Legislature of Georgia passed an Act authorizing the Governor to endorse the bonds of the Macon & Brunswick Railroad Company to the extent of $10,000 per mile, and on the next day, December 4th, passed a series of resolutions annexing certain conditions to said endorsement. Under the authority thus given, bonds, to the amount of $1,950,000 were issued by the Company and endorsed by the Governor, and subsequently negotiated. By the terms of the Act, the State's endorsement operated as a mortgage, superior to all other liens.

On June, 22d, 1870, the Railroad Company executed a written mortgage to the Governor for the purpose "of confirming the lien created by the aforesaid Act in favor of the holders of said bonds, so endorsed as aforesaid." Record, p. 12.

This mortgage was accepted by the Governor and duly recorded.

On October 27th, 1870, said Act of December 3d, 1866, was amended so as to authorize the Governor to endorse the

bonds of said Company to the extent of $3,000 per mile, in addition to the endorsement of $10,000 per mile authorized by the original Act.

Before the Act of October 27th, 1870, but after that of 1866, the Company had issued a second class of bonds to the amount of $1,100,000, secured by a second mortgage on the road. The trustees of this second mortgage, with consent of their bondholders, released, or rather postponed, their lien in favor of the bonds of said Company, to the amount of $600,000, to be issued by the Company, and endorsed by the State, under the Act of October 27th, 1870. This release, or postponement (exhibit B, of the bill, Record, p. 14), was accepted by the Governor, and deposited by him in the Executive Department, at Atlanta. It is dated November 1st, 1870. After the execution of said release, and its acceptance by the Governor, the $600,000 series of bonds, authorized by the Act of December 3d, 1866, as amended by by that of October 27th, 1870, was issued by the Company, endorsed by the Governor, and negotiated and passed into the hands of *bona fide* holders.

During the session of 1872 of the Legislature, that body appointed a committee to investigate the validity of the State's endorsement upon the bonds of the M. & B. R. R., (among other bonds endorsed by the State,) and after such investigation, to-wit: On August 14th, 1872, passed the resolution appearing on page 3 of the Record, confirming the State's endorsement of both series of the bonds of the M. & B. R. R.

After the passage of this resolution, and before any further action by the State on the subject, Appellant bought the bonds sued on, the same being a part of the $600,000 series.

On July 1st, 1873, and November 1st, 1873, the Company failed, and has since continuously failed to pay the interest on all of its bonds. On July 2d, 1873, the Governor seized the road, under the power vested in him by the Act of 1866.

On March 6th, 1875, the Legislature passed resolutions declaring the endorsement of the State on the $600,000 series of bonds "unconstitutional, null and void"; re-affirming the validity of the endorsement on the $1,950,000 series, and authorizing the Governor to sell the road, with its franchises, etc., for money, or bonds, of the $1,950,000 series,

as in his judgment might be consistent with the interest of the State.

It will be perceived that no repudiation of the State's endorsement of the $600,000 series took place until nearly two years after the failure of the Company and the seizure of the road by the Governor in the interest of the holders of *both* series of endorsed bonds. The trust was not repudiated until the trustee had obtained possession of the mortgaged property; upon doing which she repudiated the trust, and her endorsement, leaving the holders of the repudiated bonds remediless, whether as against the endorser, or as against the property conveyed, in trust, for the payment of the bonds, unless the present suit can be maintained.

The Governor seized the road, as stated, and appointed Flewellen, one of the defendants, Receiver, to take possession of the road, and other property, and sell the same.

Flewellen, under orders from the Governor, advertised all the property for sale, on the first Tuesday in June, 1875, "for cash, for the bonds of the State, or the first mortgage bonds of the Company, endorsed in behalf of the State, under the authority of the Act, approved December 3d, 1866." Record, p. 4.

The Governor in his order directing the sale uses the same language (Record, p. 4,) but on the day of sale caused it to be announced that said first mortgage bonds would only be received at their then market value, which was much below par. Flewellen notified the Governor, in advance of the sale, that the time selected was unfortunate, and the Governor expressed himself to the same effect, but nevertheless persisted in having the property sold. See Governor's letter—Record, p. 24.

The sale took place as advertised, and the property was bought by the Governor, and a deed made by him to the State. Record, p. 24. The price at which the whole property was bid off was $1,000,000. All the bonds of the $1,950,000 were taken up by the State prior to the filing of this bill, the State substituting her own bonds for them. Since the seizure of the road the Company has been hopelessly insolvent.

The bill is filed for the purpose, among other things, of foreclosing said mortgage in favor of the payment of the $600,000 series of endorsed bonds, upon the assumption that said mortgage is to the Governor as trustee for the bondholders.

The State officers demurred, and plead that the suit was an attempt to sue the State. The demurrers were sustained, and the bill dismissed as to them. The judgment of the Circuit Court sustaining the separate demurrer of Alfred H. Colquit, and the joint demurrer of Edward A. Flewellen, Wm. A. Lofton and George S. Jones, the State officers mentioned, and dismissing the bill as to them, was affirmed by the Supreme Court on Dec. 3, 1883. The mandate of the Supreme Court was not returned to the Circuit Court until the winter of 1885, when, on Dec. 16, 1885, it was made the judgment of the Circuit Court. At May rules, 1886, May 3rd, the order to take the bill pro confesso against the Macon & Brunswick R. R. Co. was filed. Notice of this order was served on Robt. N. Ely, the Solicitor for the M. & B. R. R. Co. on June 9, 1886, with further notice that final decree would be moved for on June 12, 1886.

Upon the hearing for final decree it appearing that the property was in the hands of Henry Fink as receiver of the U. S. Circuit Court for the Eastern Division of Tennessee, appointed in some case to which complainant was not a party, and of which they had no notice, the motion was disallowed, but without prejudice to complainant's right to renew the motion after making said receiver a party. Subsequently the receiver sold the railroad under proceedings had in the Tennessee Federal Court to certain parties, who in turn sold to the East Tennessee, Virginia & Georgia Railway Co., the present defendant.

On Dec. 30, 1886, the order requiring the receiver to be made a party was revoked, and leave granted to complainants to file the supplemental bill then presented to the Court, making the E. T. Va. & Ga. Railway a party.

The supplemental bill gives a resume of the original bill, and then alleges that after the deed made by Governor Smith to the State of Georgia, the State sold the M. & B. R. R. to the E. T. Va. & Ga. Railroad Co., the second of that name in this controversy, who purchased with full knowledge of all previous transactions had in reference to the M. & B. R. R., including the suit then and still pending; that afterwards, on May 26, 1886, under some proceeding of a judicial character, to which complainants were not parties, and the particulars of which are not known to them, the E. T. Va. & Ga. Railway Co. purchased the M. & B. R. R. with full notice of all such matters and things, etc. The supplemental bill then charges that under the facts as set

forth, the State of Georgia held said M. & B. R. R. as trustee of all bondholders, whose bonds were endorsed by the State, and that the purchaser having bought with notice took the title charged with the trust. The original bill also charges that the $1,950,000 series of the endorsed bonds having been paid by the State, as that bill alleges and as admitted in the answer of the E. T. Va. & Ga. Railway Co., the statutory mortgage enures to the benefit of the $600,000 series.

The answer of the E. T. Va. & Ga. Railway Co., and the agreement of counsel, record 58 et seq. and 151, admit all material allegations of *fact* made by the bill and supplemental bill, but the answer insists, *inter alia*, that the endorsement by the State of the $600,000 series of bonds is void, and relies on an amendment of the Constitution of 1868, passed on the 25th of February, 1875, and 27th of February, 1877, the Constitution of 1868 requiring amendments to be passed at two successive sessions of the legislature, and by a two-thirds vote at each session. The provision of the Constitution is as follows:

"Article XII, Sec. 1. This Constitution may be amended by a two-thirds vote of two successive legislatures, and by a submission of the amendment to the qualified voters for final ratification."

The amendment of the Constitution on which the defendant relies reads as follows: So far as relevant to the point under consideration:

"SECTION 1st. Be it enacted by the General Assembly of the state of Georgia, That the following be added as an amendment and an additional clause to the sixth section of the third article of the Constitution of this State, to-wit:

"Neither the General Assembly, nor any other authority or officer of this State, shall ever have power to pay, or recognize as legal, or in any sense valid or binding upon the State, any direct bonds, gold bonds, or currency bonds, or the State's alleged guaranty or endorsement of any railroad bonds, or any other bonds, guarantees or endorsements heretofore declared to be illegal, fraudulent or void, by act or resolution of the Legislature of the State, or that may be declared illegal, fraudulent or void by act or resolution of the Legislature originating this amendment, viz.: The State gold bonds, issued under the act of October 17, 1870, in aid of the Brunswick & Albany Railroad Company; the currency bonds, issued under the act of August 27, 1870;

the quarterly gold bonds, issued under the act of September 15, 1870, which are enumerated in the act of August 23, 1872; the endorsement of the State upon the bonds of the Brunswick & Albany Railroad Company, made under the act of March 18, 1869; the endorsement of the State upon the bonds of the Cartersville & Vanvert Railroad Company, and of the Cherokee Railroad Company; the endorsement of the State upon the bonds of the Bainbridge, Cuthbert & Columbus Railroad Company; and all other bonds, guarantees or endorsements declared illegal, fraudulent or void as herein provided. Nor shall any General Assembly ever have power to provide for the re-endorsement of such railroad bonds, or to place the State's guaranty upon the same; or to provide for the endorsement or guaranty by the State of any new bonds issued in lieu of, or to pay off, or retire such railroad bonds by any railroad company; or to issue bonds of the State to such railroad companies, or other persons, in payment or in lieu of such endorsed bonds, or other bonds herein declared illegal; or to lend the aid or credit of the state by any act, resolution or law, to such railroad company, or to other incorporated companies or persons acquiring or succeeding to the rights and franchises of said companies; or to buy the railroads of said companies; or to to submit the question of the liability of the State upon any of the bonds, or endorsements upon bonds, or other guaranty herein declared illegal, fraudulent and void, or upon any claim for money advanced upon said bonds, endorsements or guaranties, or expended by said companies or other persons in and about the construction of said railroads, to the decisions of any court, tribunal, or persons whatever; or to pay, assume or secure, directly or indirectly, by any act, resolution or law, any money advanced, or claimed to have been advanced, on the bonds, endorsements or other guaranties herein declared to be invalid."

Subsequent to the passage of this act by the Legislature of 1875 the resolutions of March 6, 1875, were introduced into the Senate, declaring the endorsement of the State upon the $600,000 series of the M. & B. R. R. "unconstitutional, null and void," which were passed and sent to the House, where they were amended and passed and returned to the Senate. The amendment was concurred in by the Senate, and the resolutions finally approved by the governor March 6, 1875. The action of the Senate upon the resolutions thus appears on the Journal of that body:

"On motion of Mr. Cain, the Senate took up the report of the special committee on the bonds of the Macon & Brunswick Railroad Co.

"Mr. Kibbee moved to amend the second resolution reported by the committee by filling the blank with the words '27th October, 1870,' which was agreed to. Mr. Kibbee moved further to amend the first resolution by filling the blank with the words 'December 3, 1866,' which was agreed to. The resolutions as amended were then agreed to." Journal of Senate of 1875, p. 407.

The resolutions were then transmitted to the House, where they were amended into their present form. They were then returned to the Senate where the following proceedings were had:

"On motion of Mr. Kibbee, the House amendments to the Senate resolution in regard to the State's endorsement of the first mortgage bonds of the Macon & Brunswick Railroad, and the State's endorsement upon the bonds of the Macon & Brunswick Railroad were taken up and concurred in." Journal of Senate of 1875, p. 490.

The State seized the road in July, 1873. The $600,000 series of bonds were not declared void until March 6th, 1875. From date of seizure to March 6th, 1875, the State received the earnings of the road and covered them into the Treasury, paying during that period the coupons of the $1,950,000 series of bonds, but failing to pay the coupons of the $600,000, although during that period both series stood upon the same footing as to validity under resolution of August 14, 1872. Record—Answer of defendant—p. 64.

The answer claims that the Act of October 27th, 1870, authorizing the issue of the $600,000 series of bonds is unconstitutional:

First. Because the $1,100,000 series, for which Strang & Goodwin are trustees, was a valid prior lien, notwithstanding Strang & Goodwin's deed of release, and therefore the Governor could not legally endorse the $600,000 series. See Release, Record 14.

Second. That no sufficient amount of stock was subscribed by private persons to authorize the Governor to make the endorsement.

Third. That the Constitution of Georgia required provision to be made that the whole property of the company should be bound by first lien to the State to secure State's

endorsement, and denies that any such provision was made. Record, 60.

The answer further denies the right of holders of the $600,000 series of bonds to bid on the railroad, and apply their bonds in part payment of the bid after first bidding enough to pay off the $1,950,000 series, and it avers that the one million bid by the State was the full market value of the road. Record, 64.

Exhibits C. & D. of the answer show that the State leased the road for twenty years for $194,000 per annum. Record, 72, 74.

And Exhibit D shows that the security given for payment of the rent was "not even doubtful." Record, 74-5.

Exhibit D of the answer further shows that the lessees were bound at the termination of the lease to turn said road over to the lessor "in as good condition as it was when received by the company—lessees—from the State under said lease." Record, 75.

The answer pleads the statute of limitation. Record, 68.

The Act of 1879, under which the M. & B. R. R. was first leased and then sold to Jas. M. Couper and his associates, under whom defendant claims, provides, *inter alia*, "should any cause be pending in any of the courts of this State, either for or against said M. & B. R. R., they are to continue to a legal termination, as though said road had not been leased." Couper and associates became a corporation. 2, 28, 80, Defendant's Answer, Record, 65-72.

The answer alleges that Couper and associates were put in possession on March 1, 1880, of said railroad by the State. Record 66.

Says no breach of trust can be imputed to the State. Record 69. That if sale is set aside, the Court makes State liable to defendant, and the State would have first lien for $1,950,000 paid by it; and that the Court has no jurisdiction to take the property from control of the State. Record 69.

The answer further alleges that the State is an indispensable party. Record 70.

The answer further sets up numerous sales of said railroad as its chain of title; among others a sale of the railroad under a decree of the United States Circuit Court for East Tennessee, which decree ordered the sale of the road as the property of the E. T. Va. & Ga. Railroad; under which de-

cree and the deed made in pursuance thereof the defendant holds title. These proceedings are attached to the answer as exhibit L. The decree is to sell the whole E. T. Va. & Ga. Railroad system, which included the M. & B. R. R. Record 99.

Said decree of "Foreclosure and Sale," as it is called, was a consent decree rendered January 11, 1886. Record 99.

It provides "that said sale shall be made subject to any *and* all outstanding mortgages covering or embracing the said property and premises, or any part thereof, as to the portions thereof which may be embraced in said mortgages respectively which constitute liens upon said property prior to the lien of the several mortgages foreclosed in this suit." The suit in Tennessee, Record 109, 110.

The decree also states that there are other suits pending "between the parties hereto" in various U. S. Circuit Courts, among them the U. S. Circuit Courts for the Northern and Southern Districts of Georgia. Record 108.

It then provides further, that "the purchaser, or purchasers, of the said property at said sale shall, as a part of the consideration of the purchase and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy and discharge any and all claims now pending and undetermined in either of said Courts, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this Court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages foreclosed in this suit and subject to which said property shall be sold" Record 110.

And again: "And said purchaser, or purchasers, their successor or successors or assigns, shall have the right to appear and make defence to any claim, debt or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or successors or assigns, shall also have the right to enter appearance in this or any other Court and contest any claim or demand pending and undetermined at the date of the confirmation of such sale." Record 110, 111.

Under this decree the M. & B. R. R. was sold, and a decree confirming said sale was had June 28, 1886. Record 121.

This confirmatory decree provides among other things, "the said purchasers and their assigns are hereby subrogated

to all the rights of all lien holders *parties to this suit.*" Record 122.

The decree confirming the sale further provides. "And it is further ordered, adjudged and decreed that the said purchasers shall take said property, and that it be recited in the deed that they do take said property subject to, and that the said purchasers assume and pay off, any and all debts, claims and demands of whatsoever nature now pending and undetermined in either of the courts in which the original and ancillary bills in this cause are pending which may be allowed and adjudged by this court or either of said courts where ancillary bills are pending, as prior to any right secured under the said consolidated first mortgage, under foreclosure of which the said sale was made." Record 125.

As a part of Exhibit L, attached to the answer, is the incorporation act of Tennessee, which is headed, "Incorporation of East Tennessee, Virginia & Georgia Railway Company Under Laws of Tennessee." Among other things that act has the following provision: "Section 4. Be it further enacted, That nothing in this act contained shall be so construed as to interfere in any manner with valid prior mortgage liens, if any, upon the property, rights, franchises and privileges of the company, whose road may be sold as aforesaid." Record 140, 141.

The case came on to be heard on June 28, 1890, and after argument had, Judge Pardee rendered his decision in which he dismisses the bill on the sole ground that the sale made first Tuesday in June, 1875, "Having been made according to a statute passed by the Legislature of the State of Georgia prior thereto, which it was competent for such Legislature to make, was a valid sale, and as such, divested the complainants of all liens and equities that may have existed in their favor as bondholders of the M. & B. R. R. against the property of the M. & B. R. R. Co." Record 154.

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vs.
THE MACON & BRUNSWICK RAILROAD CO., ET AL.

Assignment of Error.

Afterwards, to-wit: At the October term, 1893, of said Court, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the appellants, George A. Cunningham and John P. Branch, by William W. Montgomery and Charles N. West, their solicitors, and say that in the record and proceedings aforesaid there is manifest error in this, to-wit: That by the record aforesaid it appears that the decree aforesaid dismissing said bill is founded upon the ground stated by the Circuit Court, to-wit: "That the sale made by the State of Georgia of the Macon and Brunswick Railroad property on the first Tuesday of June, 1875, having been made according to a statute passed by the Legislature of the State of Georgia prior thereto, which it was competent for such Legislature to make, was a valid sale, and as such divested the complainants of all liens and equities that may have existed in their favor as bondholders of the Macon and Brunswick Railroad against the property of the Macon and Brunswick Railroad Company."

Whereas complainants insist:

1st. That said sale was not made according to a statute passed by the Legislature of the State of Georgia, and that said sale was not a valid sale; nor did it divest complainants of all liens and equities that may have existed in their favor as bondholders of the Macon & Brunswick Railroad against the property of the Macon & Brunswick Railroad Company.

2d. That even if said sale was made under an Act of the Legislature of Georgia, yet the State of Georgia, having been made Trustee for complainants, both by that Act and by the mortgage from said Company to the Governor of Georgia (see Record, p. 12), had no right to favor one set of the beneficiaries, under the trust accepted by her, to the detriment of another; for whatever right she may claim to repudiate her endorsement she cannot, constitutionally, impair the obligation of the contract between the beneficiaries

and the Company; nor had she a right to purchase the Trust property at her own sale as Trustee.

And the said complainants pray that said decree, dismissing said bill, may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said decree; complainants submitting that even if the judge presiding was right in all else, he erred in dismissing the bill as to the Macon & Brunswick Railroad Company, against which complainants are entitled to have a general judgment on their bonds.

W. W. MONTGOMERY,
CHARLES N. WEST,
} Complainants' Solicitors.

QUESTIONS FOR THE CONSIDERATION OF THE COURT.

Was Judge Pardee right in dismissing the bill upon the grounds stated by him in the decree?

If not, is there any ground set forth in defendant's answer upon which the decision can be sustained?

The following grounds are relied on in the answer as sufficient to sustain the decree, even if Judge Pardee's grounds are untenable:

First. That the Act of October 27th, 1870, amending the Act of December 3, 1866, is "unconstitutional, null and void."

Second. That the Governor's endorsement is "unconstitutional, null and void."

Third. That the endorsement has been declared void by amendment to the Constitution of 1868, adopted May 1st, 1877; and by the Constitution of 1877. The inference to be drawn presumably is, that the endorsement being void, so far as it undertakes to bind the State, it was therefore inoperative to establish the contract of mortgage between the company and the holders of the repudiated bonds; and that even the bonds are void and can be successfully resisted by the company if sued upon.

Fourth. The answer sets up seven years adverse peaceable possession in defendants and their privies in estate; among the latter, the State's possession from first Tuesday

in June, 1875—the day of the sale by Governor Smith—to February 28th, 1880—the date of the deed from Governor Colquitt to Jas. M. Couper and his associates.

Fifth. The answer avers as matter of law, that breach of trust cannot be imputed to a State.

Sixth. The answer claims that if the sale by the State to Jas. M. Couper and associates be set aside, it would leave the State liable to defendants for purchase money, etc., "and the original lien of said State, with all its incidents, would be revived," etc. Record, p. 69.

Seventh. The answer claims that State is indispensably a party.

We will take up the questions in the order stated.

I.

Was Judge Pardee right as to the ground upon which he based his decision, towit: "That the sale made by the State of Georgia of the M. & B. R. R. property on the first Tuesday in June, 1875, having been made according to a statute passed by the Legislature of the State of Georgia prior thereto, which it was competent for such Legislature to make, was a valid sale, and as such divested the complainants of all liens and equities that may have existed in their favor as bondholders of the M. & B. R. R. against the property of the M. & B. R. R. Co."?

It is submitted that the judge erred in assuming that the sale was made according to a statute which it was competent for the Legislature to make.

The only statute authorizing the sale at that time is that of December 3, 1866, as amended by that of October 27th, 1870. Those statutes require the road to be sold "in such a manner and at such time as in his judgment may best subserve the interest of all concerned."

Was the sale not rather made in obedience to the resolutions of March 6th, 1875, which required the sale to be had "if found to be practicable, as early as the first day of June, 1875"?

And the requirement is, in selecting the time, place and conditions of the sale, that he should look alone to the interest of the State. Said resolutions expressly exclude, or, rather, do so by necessary implication, the $600,000 series of bonds from being used as part of the purchase money.

So that had the holders of that series bid, say $2,500,000

on the road, and had offered in cash a sufficient sum to pay off the $1,950,000 series of bonds, they still would have been excluded from using their bonds to pay the balance. It is surely sound law to say that if the endorsement of this series was void as to the State's endorsement, such endorsement and its acceptance by the company, and the actual sale of the bonds by the company, was a good statutory mortgage as between the company and the bona fide purchasers of the bonds.

Allowing these bonds to come in as part of the purchase money after enough had been bid to pay the $1,950,000—called in the resolutions of 1875 first mortgage bonds—would not have hurt the State. Their rejection destroyed the bonds and deprived the holders of their property without due process of law. The Governor in selling the road followed implicitly the instructions given in the resolutions of 1875; he did *not* follow the Act of 1866.

That the holders of these repudiated bonds could have saved themselves harmless had they been permitted to enter the lists as bidders, as they must have been if the sale had taken place under the Acts alone, is evident from the fact that the State leased the road not a great while after this high hand-d "purchase," for $194,000 per annum for twenty years, with "undoubted security" for the rent; over $15,000 a year more than enough to pay the entire interest on both series of bonds.

This fact also shows the hollowness of the claim that the $1,000,000 bid by the State was a fair value for the road, which, it is to be borne in mind, was, at the expiration of the lease, to be returned to the State in as good order as it was when delivered to the lessees.

Was not the sale of a piece of property by a trustee, which was paying $194,000 rent per annum, for $1,125,000, such gross mismanagement as to amount to legal fraud? Especially as the security was "undoubted?" The Governor by excluding the holders of the $600,000 series from bidding "chilled the bidding." He also sold at a time which he admits was not propitious. "When the acts or omissions of a trustee are such as show a want of reasonable fidelity, a Court of Equity will remove him." Cavender vs. Cavender, 114 U. S., 464; 29 L. ed., 212. Letter to Flewellen, Record, 24. Order for sale, Record, 71-72. Governor Smith's deed to State, Record, 25.

Is it not obvious then that the sale was made in obedi-

ence to the resolutions of 1875, and not under th 1866? Had the Legislature the power to use juc thority and declare the bonds void, and then direct of the property?

Article I, Section 31 of the Constitution of 1868 of Georgia provides that "The legislative, executive and judicial departments shall be distinct, and each department shall be confided to a separate body of magistracy. No person or collection of persons being of one department shall exercise any power properly attached to either of the others except in cases herein expressly provided." Code of Georgia of 1873, section 5023. The resolutions of 1875 come under no excepted case.

The seizure by the State, though originally legal, becomes tortious the moment she violates the conditions of the trust. Gregg vs. Van Phul, 1 Wall., 274; and hence is no defense to parties in possession. Doty vs. Hawkins, 6 N. H., 247.

Even if the sale was made under the act of 1866, the exclusion of the holders of the $600,000 series from bidding, and the purchase of the State at its own sale, together with the gross inadequacy of price, would vitiate the sale, complainants electing as they do in their bill to set it aside.

It is obvious that the governor never intended to pay the $600,000 series, even while the resolution of August 14, 1872, was the only guide he had for his duty. He seized the road July 2, 1873; he paid interest on the $1,950,000 series from that time up to and since the passage of the resolutions of March 6, 1875, until State bonds were substituted for the $1,950,000 series by act of February 1877. Record 59.

He refused to pay the interest on the $600,000 series at any time. The answer confesses this, and the copies of the bonds attached to the original bill as Exhibits C and D, Record 18 and 20, show the coupons of November, 1873, and all after that time still attached to the $600,000 series, whereas the earliest due of those attached to the $1,950,000 series are payable January 1, 1877. The bill was filed September 29, 1877, Record 1, and sets forth a copy of the first mortgage bonds as they existed at the filing of the bill.

It is further submitted that the governor had no authority, at the time of his seizure, to take possession under the act of 1866 alone. He could only do so under that act as amended by the act of October 27, 1870: i. e. In the in-

terest of all concerned. At that time the $600,000 series had been declared binding on the State by the resolution of August 14, 1872. Hence the seizure was in the interest of *both* series of bonds, or wholly unauthorized.

That the governor intended from the time of the seizure to use the road in the interest of the $1,950,000 series only, is made manifest by the foregoing facts. Does the fact that the seizure was made in conformity to the *mode* prescribed by the act of 1866 do away with the manifest tortious wrong that was intended to be, and was committed against the holders of the second series of bonds? Does not the wrong subsequently committed render the action of the governor tortious from the beginning? *Auc. supra.* Was not the seizure itself tortious at its inception?

In any event, the sale was void, because it did not pretend to be made so that such sale would "best subserve the interest of all concerned."

The whole proceedings show a fixed determination on the part of those in authority, not to repudiate the State's *endorsement* alone, but to declare "unconstitutional, null and void" a solemn contract between the R. R. Co. and the purchasers of its bonds.

"Provisions, when acted on by the State and by third persons, constitute, in law, a binding contract with them, the obligation of which cannot be impaired." Curran vs. Arkansas, 15 How., 533.

"A State can no more impair by legislation the obligation of its own contracts than it can impair the obligation of the contract of individuals." Woodruff vs. Trapnall, 18 How., 361.

"A fund set apart and an invitation to the public to give credit to it under an assurance that it was placed there to pay liabilities; when credit is there given, a contract between the state and the creditor not to withdraw that fund to his injury at once arose." Curran vs. Arkansas, *supra.*

It certainly was not necessary to save the State harmless, to prohibit complainants from bidding. All the State had to do was what she did do—repudiate complainants' bonds. That ended her liability so long as she chose to occupy that position.

If the intention was to prevent any of the proceeds of sale being diverted from the payment of the first series of bonds until ~~the latter~~ was fully paid, it was not necessary

to exclude the holders of the second series from bidding. Under the statutory mortgage itself the first series must have been paid to the uttermost farthing before the second series could participate.

If the seizure was made in the interest of the first series alone, and the second series had been prejudged by the Governor eighteen months in advance of any action by the Legislature to be void, then the Governor plainly violated his duty; for, be it kept in mind, at the *date* of the seizure, and for eighteen months after, both series of bonds rested their validity on the resolutions of August 14th, 1892, besides the original Acts

We submit, then, that either the sale by Governor Smith, made in 1875, was made in obedience to the resolutions of March 6th, 1875, or it was a mere act of usurpation without any authority whatever

To show that the irregularities of this sale did seriously affect the value and title of the road, the Court's attention is called to the great discrepancy between the leasing value of the road, as leased to Couper and associates, and the purchasing price as paid by the same parties at the same period of time.

Couper and associates give $194,000 per annum as rent—about five per cent. on $4,000,000—which is the same per cent. the State agrees to receive on the deferred payments of the purchase money when it sold to Couper and associates. Record 80. And yet the State sells this road, already leased for $194,000 per annum for twenty years, the security for which "is not even doubtful" (Record 75), for the small sum of $1,125,000.

The *reason* for this strange discrepancy is not far to seek. While Governor Colquitt undertakes to give the purchasers a warranty title, he exceeds his authority in so doing, and the purchasers get only a quit claim deed. Colquitt's deed is based solely on the Acts of September 3d and October 14th, 1879.

The first section of the Act of September 3d, in fixing terms for the lease of the road for twenty years, says: "The faith of the State is hereby pledged to said Company that they shall in no case be disturbed *by the authority of the State* so long as they keep the contract on their part and make the payments when due."

In providing for the *sale* of the road the XIII Section says: "and upon the compliance fully by the lessees" (who

were allowed to become purchasers on named conditions) "with the terms of this Section, the Governor of the State shall transfer to said lessees *all the rights, privileges and franchises of the State* in and to the Macon & Brunswick Railroad track, buildings, shops, rolling stock and other things attached to said M. & B. R. R." Acts of 1879, 115 to 122.

Now, when we collate the following facts, to-wit: The pendency of the present suit, the repeated warnings given to all proposed purchasers in the chain of title to the road, growing in repetition as that chain grows in length; the guarded manner in which the legislature authorizes the Governor to lease or sell; the reason for the discrepancy between the leasing value and the selling becomes apparent. For a lease the purchasers were willing to pay an approximately full price; because, if ousted, their rental would cease—not the full price even for the lease, for had they been ousted after running the road for a short time their loss must have been great; if they bought and were then ousted they might have lost the entire purchase money. Yes, they would buy, but at a price proportionate to the unsoundness of the title the State had to offer.

And the State, by selling at the figures obtained, and by her caution in restraining her guaranty to a quit claim, showed that she fully appreciated her want of title. Would she think of selling the State Road, which she rents for $400,000, for anything like a sum which bears the same proportion to its rent, as the price received from the sale of the Macon & Brunswick bears to *its* rental?

The same section of Constitution which authorized the sale of the M. & B. R. R. authorized the sale of the State Road. Record 64.

Upon looking at the warranty embodied in the deed from Colquitt to Couper and associates, or to the Macon & Brunswick Railroad of 1880, which is the same thing, see Record, p. 74, one cannot but be struck with the elaborateness of the language used, apparently to strengthen the weakness of the title as consented to by the Legislature in the act of Sept. 3, 1879, authorizing the sale.

See Record 79. The first paragraph gives the unusual warranty, the second the ordinary one.

In this double warranty methinks the Governor "doth protest too much," not to raise a suspicion that "there is something rotten in Denmark." The acts of 1866 and 1870

give the Governor no power to purchase for the State if a sale become necessary. See the Acts.

So far as any other act authorizing such purchase is concerned, no such act was in existence when the bonds were sold, and the law of force at *that* time must govern. That law was that the purchase by a trustee at his own sale was absolutely void, not voidable only.

Mechoud vs. Girod, 4 Howard, 503. Voidable—Hammond vs. Hopkins, 143, U. S. 224; 36 L. ed., 134.

Where property is mortgaged with power to sell, the mortgagee "will be held to the strictest good faith, and the utmost diligence for the protection of the rights of his principal."

Bigler vs. Walker, 14 Wallace, 302.

Shillaber vs. Robinson, 97 U. S. R., 68.

Howard vs. Ames, 3 Metcalf, 311.

Hilliard on Mortgages, ed. 1872, 144, sec. 22.

2 How., 608; 96 U. S. R., 691.

Purchaser from a trustee who sells tortiously, where the former has notice, is a trustee.

13 Wallace, 414.

The doctrine of caveat emptor applies. 112 U. S. R., 8.

In Fla. Central R. R. vs. Schutte, 103, W. S. R. 118, the State did purchase, but the original act expressly authorized the purchase.

Nothing can be predicated on the act of 1875 authorizing a sale of the road, for "the law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage."

East Tenn. Va. & Ga. Railway Co. vs. Frazier, 139, U. S. 288; 35 L. ed. 190, the clause in a deed of land, "subject, however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part," designates and comprehends all encumbrances as if particularly described.

Keller vs. Ashford, 133, U. S. 610; 33 L. ed. 667.

II.

Was the Act of October 27, 1870, or the Governor's endorsement under it "unconstitutional, null and void" as claimed by the answer?

No circumstance existed at the time the Act was passed

to make it unconstitutional, unless it was the trust created in favor of Strang and Goodwin, Trustees; or the failure of private subscriptions to equal the amount for which the State was to endorse.

The reasons given for the unconstitutionality of both the Act and the Governor's endorsement are:

First. Because the Strang & Goodwin mortgage was a prior lien, and hence the Governor exceeded his authority notwithstanding the release of Strang & Goodwin in favor of the second series of endorsed bonds. Record, 14.

Second. Because the Constitution in force at the passage of the Act provided "that the credit of the State should not be granted or loaned to aid any company without a provision that the whole property of the company should be bound for the security of the State, prior to any other debt or lien, except to laborers; nor to any company in which there is not, already, an equal amount invested by private persons."

The averment of the answer is that these requisites were not complied with; no proof appears in the record upon this point. The Act of 1866 and its explanatory resolutions are a complete answer to the averment. A trustee for bondholders who brings suit to foreclose, can bind bondholders by recognizing paramount lien of receiver's certificates issued by order of Court in another suit. Kent vs. Lake Superior Ship Canal R. & T. Co., 144 U. S., 75; 36 L. ed., 352.

Again: Who is to judge when the Constitution is complied with?

Obviously the Legislature passing the Act authorizing the endorsement must judge of prerequisites required before the act can pass, and after the authority is given, the Governor must judge when all prerequisites, required subsequent to the act and before the endorsement, have been complied with before he places the endorsement upon the bonds. To require each purchaser of the bonds, with the Act of the Legislature and the Governor's endorsement before his eyes, to investigate this matter for himself, before buying, and then to purchase at his peril, would be to destroy the bonds.

Inasmuch as the Act of 1870 authorizes the unconditional endorsement of the $600,000 series, and recites that the road is completed, it will be presumed that the Legislature of that year satisfied itself that all precedent conditions required by law had been complied with.

If they erred, still their judgment was that of a tribunal of last resort, under which the contract was entered into, and which cannot now be impaired even by a State Constitutional Convention.

Young vs. Montgomery & Eufaula R. R., 2 Woods, 615–6.

Piqua Bank vs. Knoop, 16 Howard, 369.

Ohio Life Insurance Co. vs. Debolt, Treasurer, Ib. 431.

Douglass vs. County of Pike, 101 U. S. R., 677. See p. 687.

But admitting the endorsement unconstitutional as to the State, it is good to bind the property by way of statutory mortgage.

The repudiation of the bonds and the seizure of the property to the use of the State, so far as those acts were intended to destroy the mortgage contract between the parties, (and the whole history of the case shows that that was the intention of the officials having the matter in hand) are in violation of the Constitution of the United States.

Curran vs. Arkansas, 15 Howard, 312-14-18-19.

Jefferson Branch Bank vs. Skelly, 1 Black, 436.

Dodge vs. Wooley, 18 Howard, 331.

Fla. Central R. R. vs. Schutte, 103 U. S. R., 118, (26 L. ed. 327.)

"While a State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contract, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held, is void."

Hans vs. Louisiana, 134 U. S., 1–21. 33 L ed., 842.

"When the persons appointed by law to certify that the preliminary requisites have been complied with do so certify, their certificate is conclusive in favor of the holder, who on the strength of said certificate pays his money for the bonds without notice of any defect or illegality."

Chambers vs. Clews, 21 Wallace, 321.

Knox Co. Comrs. vs. Aspinwall, 21 How., 539–45.

Moran vs. Comrs. of Miami Co., 2 Black, 722.

Conceding, however, that the position assumed is correct, it follows that we have been induced to put our money in the road by fraud of the State's agent. The State seized our property and sold it to the defendants. It could not thereby preclude us from tracing our funds into it, nor could it divest our claim.

United States vs. The State Nat. Bank of Boston, 96 U. S., 30-6; 24 L. Co-Op. ed., 647.

So that if we got no mortgage, we at least own so much of the road as our money paid for.

Our bill seeks general relief. In the case last cited the Court say: "Surely it ought to require neither argument nor authority to support the proposition, that where money or property of an innocent person has gone into the coffers of the nation by means of a fraud, to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured person." A *fortiori*, the State's assignee, who has knowledge of the facts, cannot hold the property.

The bondholders could not possibly ascertain whether the constitutional conditions had been complied with. It was the business of the State's agent, the Governor, to state them correctly; failing to do so, the State is responsible for his act. A fraud is perpetrated, and the State loses her priority, and is postponed to the claims of those who have been fraudulently induced, by her own agent, acting within the scope of the authority conferred upon him by the State, to advance their money.

Elder vs. Allison, 45 Ga., 13.

Smith vs. Shorter, 6 Ga., 458, 75, 6, 7, 9, 480.

1 Story's Eq., sec. 191, 3, 5; 202, 3; 387.

It is claimed that the State having paid the $1,950,000 series of bonds, she stands in the place of the holders, and complainant must offer to pay these bonds before he can ask that his subordinate bonds be paid. If the argument already advanced that the alleged fraud of her agent postponed her claims to that of the complainants, is not tenable yet she is concededly surety on the first series, and is, moreover, trustee for both series under the mortgage. For the sake of clearness, let the two characters be separated, and let I represent the trustee. The trustee, then, is the creditor, and advances the various sums paid by the bondholders. What, then, is the principle?

A surety is not entitled to an assignment of the security from the creditor unless he pays off, not only the debt for which he is surety, but also such further sum as may have been advanced by the creditor on the security of the same mortgage. Even though the surety was ignorant of the second advance, and it was not contemplated at the time of the original loan.

Williams vs. Owens, 13 Simon, 597.

Fairbrother vs. Wodehouse, 23 Bevan, 28.

Union Bank, etc. vs. Edwards, 1 Gill & J., 346, 363, 364, 365.

1 Hilliard on Mortgages, 309, Sec. 41.

The act of 1870 shows that the necessary amount was paid in by private persons.

The amount of capital necessary to be subscribed by private persons before the State could endorse—after the adoption of the Constitution of 1868—had, by the estimate of the Legislature, authorizing the $3,000.00 a mile endorsement, been already paid in. This appears from the acts themselves. Thus: The endorsement of the first series was not made under the Constitution of 1868, and was made at a time when the Legislature had plenary power. Possessing such power, the endorsement of that series is controlled solely by the act of December 3, 1866, and the resolutions of December 4, 1866. That act and those resolutions authorized an unconditional endorsement of $1,000,000, and the endorsement of $950,000 when so much additional capital had been subscribed and paid in. The road is two hundred miles long. At the time the endorsement of the $1,000,000 was authorized, fifty miles had been completed and seventy more graded. For this much security the Legislature was willing to endorse to the extent of $1,000,000. This left, when the road was completed, eighty miles entirely built and the "superstructure" of seventy more to stand as security for the balance of the first series of bonds, $950,000, and the $600,000 of the second series; in all $1,550,000. Now the Legislature, in the preamble to the act of 1870, informs us to what extent that body was in the habit of endorsing other railroad bonds under the Constitution of 1868, to-wit: $15,000 per mile.

But the theory of that Constitution is that the Legislature is to endorse for only one-half the cost of the road; for it requires an amount equal to the State's endorsement to be first "invested by private persons," inasmuch as the Legislature, about the time of the passage of the act of 1870 —see preamble—was in the habit of endorsing for other roads to the extent of $15,000 per mile, it may fairly be presumed that the average cost per mile of railroads in Georgia at the time was $30,000. Now, before any endorsement was placed on the $600,000 series, the road had "been completed to Brunswick" at a cost, say of $30,000 per mile, i. e.,

after the endorsement of the first million, not made under the Constitution, eighty miles more were finished at a cost of $2,400,000, and seventy miles had received their "superstructure." What the cost of this "superstructure" was, we have no means of knowing with certainty; but including bridges to be built, it is not extravagant to say the cost did not fall below $700,000; at all events, the proper officer so judged. [Note—The Legislature itself so adjudged, and authorized an unconditional endorsement of $3,000 per mile in addition to the $10,000 authorized *conditionally* by act of December 1866. See acts of 1870, p. 336.] Will this Court undertake to say that his judgment was erroneous, and that we must suffer for it? Now all the road had "been completed to Brunswick" before the first bond of the second series was issued, and the State had endorsed, under the Constitution of 1868—or rather, under the act of 1866 with it cognate resolutions—to the extent of $950,000, in addition to the $1,000,000 authorized unconditionally by the act of 1866. So that, at the date of the endorsement of the $600,000 series, November 1, 1870, there must have been invested by private persons in that portion of the road which was unfinished at the passage of the act of 1866, an amount equal to those endorsed bonds which came under the required condition. If the whole road is assumed to have cost $30,000 per mile—the average cost of the construction of railroads at the time assumed by the Legislature for the purpose of determining the amount of bonds to be endorsed by the State—then we have an amount "invested by private persons," including the proceeds of the $1,950,000 series, of $6,000,000 as security for the endorsement of $2,550,000 by the State.

That under the policy of the government in forcing a return to specie payment prematurely, this value should have shrunk is a misfortune which was not foreseen and left unprovided for, and which fell, like all stringencies in the money market do, with crushing force on the debtor class, compelling the road to pass its coupons and reducing its value fifty per cent.

BONA FIDE HOLDERS PROTECTED.

Governor the proper person to determine whether conditions have been complied with which authorize endorsement; purchaser not bound to enquire.

Comrs. of Douglass Co. vs. Bowles, 94 U. S., 104, 110; 24 L. C. Op., 47.

Complainants not bound to prove that they are bona fide holders. Ib.

Comrs. of Marion vs. Clark, 94 U. S., 278.

On both above points see City of San Antonio vs. Mehappy, 96 U. S., 312.

Strong authority in favor of complainant's position.

City of Nauvoo vs. Ritter, 97 U. S., 389.

Bd. of Comrs. of Johnson Co. vs. January, 94 U. S., 202.

Henry Co. vs. Nicolay, 95 U. S., 619.

If the Governor acted falsely, bonds good in hands of bona fide holders.

Northern Nat. Bank vs. Porter Township, 110 U. S., 608, 619.

The certificate of the proper officer, or the recitals in the bonds, is conclusive as to the facts required by the enabling law, but not as to a conclusion of law drawn by the officer or the recital from the facts.

Chambers vs. Clews, 21 Wallace, 321.

Crow vs. Oxford Township, 119 U. S., 215; 30 Bk. L. Co. Op., 388.

Moran vs. Comrs. of Miami Co., 2 Black, 722.

ESTOPPEL.

Corporation cannot deny that conditions have been complied with.

13 Wallace, 297, 19 Ib., 666, 1 Ib., 291, 272; 24 How., 435.

U. P. R. R. vs. U. S., 99 U. S., 402, 434.

Marey vs. Township of Oswego, 92 U. S., 637; Ib., 642; Copies Bond, Wh. see.

Town of Venice vs. Murdock, 92 U. S., 494.

Town of Oregon vs. Jennings, 119 U. S., 74; 3 H. N. See body of decision. 30 Bk. L. Co. Op. Ed., 323.

If charge in answer (Record, p. 61) is relied on as a charge of knowledge of any act of fraud, that act must be stated.

Comrs. of Marion vs. Clark, 94 U. S., 278.

III.

It is again claimed that the endorsement of the $600,000 series has been declared void by an amendment of the Con-

stitution of 1868, adopted May 1, 1877, and by the Constitution of 1877, as set out in the answer. Record, 64.

Waiving the question as to whether this *subsequent* action of the legislature, confirmed by popular vote, or the Constitutional Convention of 1877, could destroy the mortgage which secured the bonds, or in any manner affect those bonds, a critical examination of the amendment of May 1st, 1877, and of the Constitution of 1877 will show that the bonds of the Macon & Brunswick Railroad are not affected by either instrument.

The M. & B. R. R. bonds are no where mentioned in the Act passed on February 25, 1875, amending the Constitution of 1868. The most that can be said is that the amendment attempts to delegate the power to amend the Constitution to the legislature of 1875; and that power is to be exercised by a mere resolution passed by a bare majority vote of a quorum.

In addition to the amending act heretofore quoted, and the resolutions of the Legislature of 1875, declaring the endorsement void, and the extracts from the Journal of the Senate of 1875, the Constitution of 1868—of force when the repudiating resolutions were passed—reads as follows:

"Yeas and Nays—Whenever the Constitution requires a vote of two-thirds of either or both houses for the passing of an act or resolution, the yeas and nays on the passage thereof shall be entered on the journal." Constitution of 1868, Article III, Sec. 4, Par. 9. Code of 1873, Sec. 5060.

No such entry appears on the Journal of the Senate of 1875, showing that the repudiating resolutions were passed by a two-third vote, or that the yeas and nays were called and entered on the journal. The final entry on the journal upon the subject of the repudiating resolutions is, that the amendments of the House be concurred in. A similar examination of the Journal of the House would doubtless show the same thing, but one is sufficient.

The Journals of the Legislature may be inspected by the Courts to ascertain if the Constitutional requirements necessary to the passage of an Act have been complied with. Welborn vs. Estes, 70 Ga., 390–401. Howell vs. State, 71 Ga., 224–229.

"No bill shall become a law unless it shall receive a majority of the votes of all the members elected to each house of the General Assembly, and it shall, in every in-

stance, so appear on the journal." Constitution of 1877, Article III, Sec. 7, Par. 14.

The Constitution of 1877 (See Record, 64) only declares void "bonds which have been pronounced illegal, null and void by the General Assembly and the Constitutional amendments, ratified by a vote of the people on the first day of May, 1877."

No particular bonds are specified.

It will thus be perceived that the Constitution of 1877 repudiates only those bonds which have been declared void *both* by the General Assembly and the Constitutional amendments of May 1st, 1877. It has been shown that the M. & B. R. R. bonds do not fall under that head.

But no State Constitutional Convention has the power to impair the obligations of a contract, even in an indirect manner. When the Constitution of 1868 of Georgia prohibited the State courts from taking jurisdiction of any contract for the purchase or hire of slaves, the Supreme Court of the United States declared the provision void.

The general terms of the Constitution of 1868 are confined by a well known rule of interpretation to the particular cases enumerated and intended to be affected.

Broom's Legal Maxims, M. P. 515–6, ed. of 1852.

Prescribed forms for the amendment of the Constitution cannot be departed from.

Cooley's Constitutional Limitations, 130.

Constitution of 1877 cannot annul bonds issued previous to its passage.

Clay Co. vs. Soc. for Savings, 114 U. S. R., 579–591.

County of Moultrie vs. Rockingham Savings Bank, 92 U. S. R., 631.

If endorsement void as to State, statutory mortgage still good.

Fla. Central Railroad vs. Schutte, 103 U. S. R., 118.

IV.

The answer sets up the statute of limitations of seven years and relies on the possession of the State from first Tuesday in June, 1875, until February 28th, 1880, as part of the time necessary to make out the seven years.

This suit has been pending ever since September 29th, 1877, and defendants are put upon notice time and again by their own chain of title that there were suits pending

against the road in other courts; among them the United States Circuit Court for the Southern District of Georgia, whence this case is appealed. Defendants bought subject to the contingencies that might happen in these suits.

Certainly no time during which the State was in possession can be called in to aid in making out the statute of limitations. The San Pedro & Canon del Aqua Co. vs. U. S., 146 U. S., 120--139, 36 L. ed. 911, h. n. 3.

The mandate from the United States Supreme Court, sending this case back to the Circuit Court, was not filed in the Circuit Court, nor made the judgment of that Court until December 16th, 1885.

The order to take the bill *pro confesso* as against the Macon & Brunswick R. R., was filed at May Rules, 1886. Record, 47. And the supplemental bill was filed December 30th, 1886.

But if the statute of limitations has any application, it is the twenty-year, and not the seven-year statute.

"Actions upon bonds or other instruments under seal, shall be brought within twenty years after the right of action accrues, but no instrument shall be considered under seal unless so recited in the body of the instrument."

Code of Georgia, ed. of 1882, Sec. 2915.

"All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

Ib., Sec. 2916.

STATUTE OF LIMITATION.

Has no application to supplemental bills.

Jenkins vs. International Bank of Chicago, 127 U. S., 484, 32 L. ed., 189.

May be suspended by causes not mentioned in the statute.

Braun vs. Sauerwein, 10 Wallace, 218.

Montgomery vs. Hernandes, 12 Wheat., 129.

Hanger vs. Abbott, 6 Wallace, 532.

Suspended during the war.

Ogden vs. Blackledge, 2 Cr., 272; Levy vs. Stewart, 11 Wal., 244.

Hiatt vs. Brown ("Brown vs. Hiatts"), 15 Wal., 177.

Holdane vs. Sumner, Ib. 600; Batesville vs. Kaufman, 18 Wal., 151.

Ross vs. Jones, 22 Wal., 576; U. S. vs. Wiley, 11 Wal., 508; Adger vs. Alston, 15 Wal., 555; Semmes vs. City Fire Ins. Co., 13 Wal., 158.

Freeborn vs. The Protector, 12 Wal., 700; see 9 Wal., 687.

LIS PENDENS.

Purchasers *pendente lite* are as conclusively bound by the results of the litigation, whatever they may be, as if they had been parties at the outset.

Tilton vs. Cofield, 93 U. S., 163; Terrell vs. Allison, 21 Wal., 289; Miller vs. Sherry, 2 Wal., 237.

Ejectment pending, purchasers take with constructive notice.

Waldon vs. Bodley, 9 How., 34.

Suit pending for land, purchaser from defendant subject to writ of possession, if one is issued.

Lacassagne vs. Chapuis, 114 U. S., 119, 35 L. ed., 368.

LACHES.

Allore vs. Jewel, 94 U. S., 506 (24 L. Co. Op. Ed., 260) was a case of undue influence in obtaining deed to lot, grantor shortly thereafter dying. Lot worth $6,000 at time. Grantee put up $7,000 worth of improvements. Six years and nine months after grantor's death her heir sued. Held that he was not barred by laches from seeking to set aside conveyance, but betterments set off against rent. We seek no rent, and defendant has had entire profits of road. "Where a purchaser at the time of taking a deed has information that a prior mortgagee, or trustee of a prior deed, has released the property from the mortgage or trust without payment of the notes it was made to secure, or their surrender, or express authority from the holders of them, he will take the property subject to any equitable right of the holder of the notes." No laches in such a case short of the statute of limitations will bar holder of notes. Conn. Gen. Life Ins. Co. vs. Eldrege, 102 U. S., 545, (26 Bk. L. Co. Op. Ed. 245). A very important case both as to the lien of our mortgages and laches.

"So long as demands secured by mortgage are not barred by the statute of limitations, there can be no laches in prosecuting a suit upon the mortgage to enforce them."

Cross vs. Allen, 141 U. S., 528; 35 L. Ed., 843.

V.

The answer states, as matter of law, that breach of trust cannot be imputed to a State.

We will wait until defendant presents the law sustaining the position, before undertaking to reply to it.

It has been decided that breach of trust may be imputed to a State. U. S. vs. The State Nat. Bank of Boston, 96 U. S. R., 30-6.

VI.

The last defence set up is that the State of Georgia is an indispensable party.

Must every grantor, even one who gives only a quit-claim, be made a party defendant to a bill by a mortgagee of realty to foreclose?

Where titles to land are assailed, the *defendant* sometimes "vouches in" his grantor or grantors, but there is no warrant for the position that the *complainant* in a bill to foreclose should make *all* grantors of the land in controversy parties defendant to his bill or suit.

INDISPENSABLE PARTIES.

The State not so. The question is *res adjudicata*. The case was dismissed as to the State only, and left to stand as against the privy in estate of defendants. Moreover, by act of October 20, 1879 (Acts of 1878-9, p. 122-3) one of the very acts under which the defendant claims, it is provided that all causes depending in the Courts, either for or against the Macon & Brunswick R. R., "are to continue to a legal termination, as though the said road had not been leased." The present action was then pending. The bill had only been dismissed as to the State officials under the decision of the case in 109 U. S., 146. (L. Co. Op. Ed., 27 Bk., p. 292.)

See Harlan's dissenting opinion in the case, citing Marshall, C. J., as to indispensable parties.

Mortgage may be foreclosed against purchaser. 92 U. S. R., 631-306.

"A claim or lien existing and continuing will be enforced by the Courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and

maintained. Thus, if the government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the Court to enforce the lien would at once attach as it existed before the acquisition of the property by the government."

The Siren, 7 Wallace, 158-9.

"A mortgage foreclosure does not cut off the rights of persons and parties under a prior mortgage, where those rights are reserved by the decree." Wabash, St. Louis & Pacific R. R. vs. McKissock, 140 U. S., 304; 35 L. Ed., 473.

"There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by judicial proceedings without making it a party; cases of this sort may arise in courts of equity where property is brought under its jurisdiction for foreclosure or some other proceeding, and the State, not having the title in fee or the possession of the property, has some lien upon it, or claim against it, as a judgment against the mortgager, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the state has in it; but its right of redemption will remain the same as before."

Christian vs. Atlantic & N. C. R. R. Co., 133 U. S., 233, 246; 33 L. Ed., 589, 593.

VII.

The point was at one time made in this case, although it is not now insisted on in the answer, that the mortgage was one of indemnity to the State in which the bondholders had no interest.

Whether the security given was in the nature of indemnity to the State, or directly vested in the bondholder, is practically of little consequence; for even if indemnity only, after default of the principal debtor, and also of the guarantor, the equity of the creditor attached to the security, and the power of the guarantor to discharge it ceased. But the nature of the security given must be determined by the law as it existed at the time that it was given.

The Constitution of 1868 required that the property was to be "bound for the security of the State prior to any other *debt*"—not *to* the State *as* security—and to secure the *debt* prior to any *other* debt. At the time that the bonds were issued, no debt was due the State; the debt was due

to the bondholder, and non-constat that there ever would be a debt due to the State. Certainly the endorsement of the governor did not create a debt. As long as the bonds remained in the hands of the company, no debt existed to any one, nor did the sale of the bonds to bona fide purchasers, per se, create a debt of the State; it was still a debt due by the company alone *until* there was default, when, for the first time the liability of the State was fixed. This distinguishes this case from that of Chamberlain vs. St. Paul, etc., Railroad, 92 U. S. R., 299, and the Tennessee bond cases, 114 U. S. R., 663.

In both of these cases the State loaned her own bonds to the company, and expressly provides for security *to* herself.

In the Tennessee bond cases the Court say: "If that obligation was to pay the bonds to the several persons who might become the holders thereof, then the security would run with the bond; but if the obligation was to pay the State for the bonds, the security would enure only to the benefit of the State."

The present case is precisely the same as Hand vs. R. R. Co., 12 So. Ca., Rep. 314, in which it was held that the endorsement "vested in the State a lien, not merely for its own protection against the guaranty, but also for the better security of the bonds themselves into whomsoever hands they might fall."

This case is cited approvingly in the Tennessee bond cases, where this Court say: "Under the South Carolina statute the primary liability for the payment of the bonds to the respective holders thereof rested on the company, and the State was bound only as surety. This was shown on the face of the bonds themselves. And the language of the statute was, therefore, to be construed with that as the subject-matter of the legislation; that is to say, a guaranty by the State of the obligation of the railroad company. Here —the Tennessee bond cases—the State is the primary obligor."

That the parties understood at the time that the mortgage was a security to the bondholders. See Exhibits *A*, *B*, *C* and *D* of original bill, Record 12 to 20.

It will be borne in mind that this interpretation of the character of the mortgage was stamped upon it by the exhibits referred to, prior to the sale of the first bond of the second series of endorsed bonds, making them, so far as this

point is concerned, stronger than the first series; for if there is any doubt of the meaning of the act, here was the interpretation given to it by the company itself at the time it offered the second series of bonds for sale.

That the State's endorsement is a "guaranty" of the bonds, see acts of 1872, p. 518, affirming "the State's guaranty placed on the bonds of the M. & B. R. R. Co."

"In equity a creditor may have the benefit of any obligation or security given by the principal to the surety for the payment of the debt."

Keller vs. Ashford, 133 U. S., 610; 33 L. Ed., 667.

MISCELLANEOUS.

Our lien is analogous to that of Newman, trustee, in the case of Farmer's Loan & Trust Co. vs. Henry M. Newman, trustee, 127 U. S., 649; 32 L. ed. 303, where the Court say: "We are of the opinion that the Court below erred in setting aside, even if it had the power to do so, the confirmation of the sale by the special master, and the order approving the deed made to the purchaser. The sale was confirmed, the deed to the purchaser approved, and the latter authorized to take possession by order of July 5, 1881. The reservations in that order did not authorize the Court to set aside the confirmation of the sale and cancel the deed to the purchaser. The confirmation of the sale and the approval of the deed were, rather, subject to the power reserved to protect and enforce by subsequent orders any claim or lien then pending, either in that Court or by its leave in a State Court. So far as Newman is concerned such protection can be given, and should be given only by an order directing the entire property covered by the $1,600,000 mortgage to be sold in satisfaction of his claim or lien, without annulling the former sale or the confirmation thereof, and without withdrawing or cancelling the deed made by the master to the purchaser."

The following are the Acts referred to in the foregoing statement.

An Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.

WHEREAS, The Macon & Brunswick Railroad has been completed to the distance of fifty miles from the City of Macon, and is thoroughly equipped, the daily trains are

running thereon, and seventy miles additional are graded and ready for superstructure; *and whereas*, its completion to Brunswick would greatly inure to the benefit of the State in developing its agricultural, commercial and manufacturing interests; *and whereas*, by reason of the financial embarrassments resulting from the late war, the stockholders of said railroad are unable to supply the capital necessary to the completion of this great work.

SECTION 1. *Be it enacted, etc.*, That his Excellency, the Governor, be, and he is hereby authorized to place the endorsement of the State on the bonds of the Macon & Brunswick Railroad Company, which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to-wit: Before any such endorsement shall be made the Governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens, or mortgages, or other incumbrances, which may in any manner endanger the security of the State; and upon the further condition and express understanding that any endorsement of said bonds, when thus made, *shall not only vest the title to all property of every kind which may be purchased with said bonds in the State*, until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood *to operate as a prior lien or mortgage on all the property of the Company*, to be enforced as hereinafter provided for.

SECTION 2. In the event of any bond or bonds endorsed by the State, as provided in the first section of this act, or the interest due thereon, shall not be paid by said railroad company at maturity, or when due, it shall be the duty of the Governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company, *and apply the earnings of said road to the extinguishment of said bond or bonds, or coupons*, and shall sell the said road and its equipments, and other property belonging to said company in such a manner and at such time *as in his judgment may best subserve the interest of all concerned*.

SECTION 3. Repeals conflicting laws.

Approved 3d of December, 1866.

Resolutions supplemental to above Act.

WHEREAS, A bill has been passed at this session of the General Assembly entitled an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes: *and whereas*, said bill authorizes his Excellency, the Governor, to place the endorsement of the State on the bonds of the Company; *and whereas*, no limitations were fixed upon the terms of sale of said bonds. Therefore, be it

1st. *Resolved*, That said company shall not sell or dispose of the bonds thus endorsed by his Excellency for more than ten per cent. discount, and the endorsement of the State upon the bonds of the said company shall not exceed one million of dollars, until an amount of capital equal to the additional endorsement shall be *bona fide* subscribed and paid into said company.

2d. *Be it further resolved*, That in order more fully to secure the payment of the bonds of said railroad company, it shall be the duty of said company to set apart annually two per cent. of the amount endorsed for, as a sinking fund, which shall be invested in State bonds and deposited with the Governor, to be held in trust for said company, and which shall be applied exclusively to the payment of the bonds of said company.

3d. *Be it further resolved*, That his Excellency, the Governor, be authorized to withhold his endorsement upon the bonds of said company until the President and Directors of said company give him written acceptance of the terms of these resolutions, and that these resolutions are received as explanatory of the bill extending the aid of the State to said Macon & Brunswick Railroad Company, and equally binding with said Act.

Approved 4th December, 1866.

An Act to amend an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.

WHEREAS, The Macon & Brunswick Railroad has been completed to Brunswick, requiring a greater outlay of money than was originally contemplated, to place the same in complete running order and to furnish the necessary cars, engines and machinery; *and whereas*, the State has, by recent legislation, endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile—

SECTION 1. *The General Assembly of the State of Georgia*

do enact, That the above recited act be so amended as to authorize the Governor to place the endorsement of the State, to the extent of three thousand dollars per mile, upon the bonds of said Macon & Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory.

SECTION 2. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same is hereby repealed.

Approved October 24, 1870.

A resolution in reference to the State's guaranty on the bonds of the Macon & Brunswick Railroad Company.

Resolved by the Senate and House of Representatives in General Assembly met, and it is hereby resolved by authority of the same, That the State's guaranty placed on the bonds of the Macon & Brunswick Railroad Company is binding on the State.

Approved August 14, 1872.

Resolved, by the General Assembly of the State of Georgia, That the State's endorsement upon the first mortgage bonds of the Macon & Brunswick Railroad, to the amount of one million, nine hundred and fifty thousand dollars ($1,950,000) issued under an act approved the third day of December, 1866, is valid and binding upon the State, and the State's liability thereto is hereby recognized and affirmed.

Resolved further, That the State's endorsement upon the bonds of the Macon & Brunswick Railroad, issued under an act approved October 24th, 1870, be, and the same is hereby declared unconstitutional, null and void.

Resolved further, That it is the sense of this General Assembly that the Macon & Brunswick Railroad, with its franchises, equipments and appurtenances be sold by the Governor at an early date, and if found to be practicable, as early as the first day of June, 1875, at public or private sale, and upon such terms, and for such price, in money, or first mortgage endorsed bonds of the Macon and Brunswick Railroad, or bonds of the State, as in his judgment may be consistent with the interest of the State: *Provided*, that no commissions or per centage shall be authorized or allowed in said sales.

Approved March 6, 1875.

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Supreme Court of the U. S.

OCTOBER TERM, 1894

No. 91

GEORGE A. CUNNINGHAM AND JOHN P. BRANCH,
Appellants,

vs.

THE MACON AND BRUNSWICK RAILROAD CO.,
et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF DANIEL H. CHAMBERLAIN,
For Appellants.

NEW YORK
ALBERT B. KING, PRINTER AND STATIONER, 87 & 89 WILLIAM ST.
1894

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THE MACON & BRUNSWICK RAILROAD COMPANY *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

The bill in equity, which is the foundation of this case, was originally filed in 1877 by a holder of bonds of the Macon & Brunswick Railroad Company, endorsed by the State of Georgia, against the Macon & Brunswick Railroad Company and others, and against certain officers and agents of the State of Georgia.

Record, fols. 1–29.

Upon demurrer, it was held in the Court below, in December, 1878, that the suit was in substance a suit against

the State, and the bill was dismissed *as to the State officers and agents.*

Record, fols. 92, 93.

Upon appeal to this Court the decree below was affirmed in October, 1885.

Record, fols. 109–112.

Cunningham vs. *Macon & Brunswick Railroad Company*, 109 U. S., 446.

The principal relief prayed for in the bill was the foreclosure of a lien held by the State of Georgia on the property of the Macon & Brunswick Railroad Company by reason of the State's endorsement of the bonds of the Railroad Company held by the complainants in the Court below.

After the decision of this Court, the case proceeded in the Court below against the Macon & Brunswick Railroad Company, against which an order for a decree *pro confesso* was made in 1886.

Record, fol. 113.

A supplemental bill was filed in 1886 making the East Tennessee, Virginia & Georgia Railway Company a defendant.

Record, fols. 119–129.

The case was heard in the Court below in 1890, and a decree made dismissing the bill with costs.

Record, fols. 372–374.

From that decree the present appeal is taken.

Statement.

Under an Act of the Legislature of the State of Georgia, approved Dec. 3d, 1866, the State endorsed

$1,950,000 of the bonds of the Macon & Brunswick Railroad Company. These bonds are known as *first endorsed bonds.*

In 1868 the Macon & Brunswick Railroad Company issued $1,100,000 of its bonds secured by a mortgage of the property of the company. These bonds are known as *first mortgage bonds.*

Under an Act of the Legislature of the State of Georgia, approved Oct. 27th, 1870, amendatory of the above-mentioned act of Dec. 3d, 1866, the State endorsed an additional amount of $600,000 of the bonds of the Macon & Brunswick Railroad Company. These bonds are known as *second endorsed bonds.*

At the time of the passage of the Act of Oct. 27th, 1870, the trustees of the first mortgage above-mentioned, with the written consent of the holders of the first mortgage bonds, postponed the lien of the first mortgage so that the additional endorsement by the State under the Act of Oct. 27th, 1870, "should stand as a lien or mortgage on said property of said Macon & Brunswick Railroad Company prior to the lien of the said mortgage executed and delivered to them as trustees."

In 1872 the Legislature of the State, after an official examination, declared the State's endorsement of the above-named bonds to be binding on the State.

Acts Georgia, 1872, p. 518.

In July, 1873, the Macon & Brunswick Railroad Company made default in payment of interest on its bonds endorsed by the State, and thereupon the Governor seized the road and put it in charge of an agent of the State, under the Act of December 3d, 1866.

The State held and operated the road until July, 1875.

In March, 1875, the Legislature, after another legislative examination, declared the endorsement of the $1,950,000 by the State, under the Act of 1866, to be

valid and binding, but declared the endorsement by the State of the $600,000, under the Act of 1870, to be unconstitutional, null and void.

Acts Georgia 1875, p. 371.

In July, 1875, the State sold the road, under a joint resolution of the Legislature, which advised the sale through the Governor, "at public or private sale, and upon such terms, and for such price in money, or *first mortgage endorsed* bonds of the Macon & Brunswick Railroad Company, or bonds of the State, as in his judgment may be *consistent with the interest of the State.*"

Acts Georgia, 1875, p. 371.

The road was sold under an advertisement of sale which fixed payment for the road at cash, bonds of the State, or *first endorsed* bonds.

Record, p. 72.

The State subsequently redeemed the *first endorsed* bonds by substituting therefor bonds of the State, but no recognition has ever been given by the State of the *second endorsed* bonds.

The road was bid in at the sale in 1875 by the Governor for the State for $1,000,000, and was afterwards conveyed by the State through several mesne conveyances to the East Tennessee, Virginia & Georgia Railroad Company, which subsequently conveyed it to the East Tennessee, Virginia and Georgia Railway Company, one of the present defendants.

Upon these facts the questions which seem to require discussion are these:

I.

What were the legal relations of the State, the Rail-

road Company, and the bondholders under the Acts of 1866 and 1870 which authorized the endorsement of these bonds?

II.

What was the legal effect of the seizure and sale of the railroad property by the State in 1875, upon the rights of the holders of the endorsed bonds of 1870?

III.

What are the rights of such bondholders as against the present owners of the property covered by the lien of 1866 and 1870?

IV.

Is the State now an indispensable party to this suit, or are there other reasons why the complainant cannot have relief as prayed for?

I.

Under the Acts of 1866 and 1870 the Railroad Company was the principal debtor, the State was the surety, and held a first lien on all the property of the company to secure the payment of the bonds to the holders thereof. The State was, therefore, the trustee and the bondholders were the *cestuis que trust.*

The Act of 1866 declared: "The said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all the property of the company, to be enforced as hereinafter provided for."

The subsequent provisions of the act directed (1) the

seizure of the property by the Governor upon default of interest or principal of the bonds, "*upon information of such default by any holder of said bond or bonds*"; (2) the application of the earnings of the road to "*the extinguishment of said bonds or coupons*," and (3) the sale by the Governor *of the road* "in such manner and at such time as in his judgment *may best subserve the interests of all concerned.*"

These provisions make it clear that the party for whose benefit the lien was taken was certainly not the State alone. The information upon which the seizure was to be made was *to come from the bondholders;* the earnings, after seizure, were to go *to pay the bonds;* and the sale was to be made for *the best interests of all concerned.*

Certainly the bondholders were concerned, if the State were not the sole party concerned.

In addition to all this, the company, in making its mortgage of June, 1870, *to confirm the lien in question* (under the Act of 1866), expressly described such lien as "the lien created by the aforesaid Act (of 1866) *in favor of holders of said bonds so endorsed.*"

Record, p. 12, fol. 30.

These several provisions show the intention of the parties to be to place a security in the hands of the State for the payment of the bonds.

But aside from the terms of the acts in question and of the above evidences of intention, the undisputed relations of the parties here have the same legal effect.

When security is given to a surety for his indemnity, the principal debtor is entitled to the benefit of such security. The surety in such case becomes a trustee and holds the security as a trust fund for the benefit of the principal debtor.

This is an undisputed doctrine of equity.

Chamberlain vs. *St. Paul R. R.*, 92 U. S., 306.
Bispham, Principles of Equity, 337.
Branch vs. *Mac. & Br. R. R. Co.*, 2 Woods, 385.

Such a trust or trust relation, where created by a State, is a contract, and is guarded against impairment by the State, like other contracts.

Barings vs. *Dabney*, 19 Wall., 1.

To the same effect are—

Hand vs. *S. & C. R. R. Co.*, 12 S. C., 314.
Railroad Companies vs. *Schutte*, 103 U. S., 118.

II.

The holders of the endorsed bonds of 1870, having the security of this lien held for their benefit by the State, the State proceeded to sell the trust fund, or the property covered by the lien, and to exclude the holders of the endorsed bonds of 1870 from all benefit of such property.

The proof of this is in the following admitted facts of the case:

Default in payment of interest occurred July 1, 1873, and thereupon, by proclamation, dated July 2, 1873, the Governor seized the road, and placed it in the hands of State agents. The State continued to hold and operate the road until its sale in June, 1875, and applied the earnings not "to the extinguishment of the bonds or coupons," but paid the same into the treasury of the State.

Record, p. 64.

The sale took place in June, 1875, under an order of the Governor, dated April 5, 1875, fixing the terms of payment for the road as "cash, bonds of this State, or first mortgage bonds of the company," thereby excluding the holders of the second mortgage bonds of 1870 from the right of buying and paying in their own bonds.

This sale was made in conformity to a resolution of the Georgia legislature of March 6, 1875, which fixed the above terms, and further directed the Governor to sell at public or private sale on such terms and for such price, in the media above named, "as in his judgment may be *consistent with the interest of the State.*"

Acts of Georgia, 1875, *p.* 371.

The sale was made nominally for $1,000,000, but no part of this fund was ever applied by the State to the payment of any part of the bonds of the company of 1870.

Thereafter the State conveyed the property to other and private parties.

These proceedings on the part of the State have this character: the State was a trustee holding a trust fund for the benefit of the bondholders of the company; by virtue of this legal relation the State was bound to act in the interest of the *cestuis que trust*, the bondholders; the State was also expressly bound by her own Act to apply the earnings to the payment of the bonds; the State was bound likewise, as trustee, to hold and apply the proceeds of such sale to the uses of the principal creditor, the bondholders.

What the State actually did has been seen.

But in addition to all this, the State being the trustee for the bondholders, not only sold the trust property, under the circumstances and upon the terms stated, *but the State, the trustee, became the buyer.*

Unless the State had an immunity, not only from suit, but from all legal obligations, the State was bound by the ordinary rules of law and equity in respect to this property.

Among such rules is that which makes a purchase by a trustee of the trust property on his own account, either void, as this Court holds (*Michoud* vs. *Girod*, 4 How., 503; *Wormley* vs. *Wormley*, 8 Wheat., 421), or voidable at the option of the *cestui que trust*, as was then held in Georgia, and in, perhaps, most of the States.

In *Worthy* vs. *Jackson*, 8 Ga., 236, it is laid down—and this was the law of Georgia when this sale was made—that "when a purchase is made by a trustee on his own account of the estate of the *cestui que trust*, although sold at public auction, it is the option of the *cestui que trust* to set aside the sale, whether made *bona fide* or not."

The sale of this road in June, 1875, by the State was, therefore, a sale voidable at the option of the bondholders of 1870, and the present suit is in terms the expression and exercise of this option.

Record, p. 5, fol. 12.

It is not necessary here to show misconduct or positive breaches of trust on the part of the trustee; it is enough to show that the trustee undertook to purchase at his own sale; perfect fairness and scrupulous integrity cannot avail to deprive the *cestui que trust* of his option in such case to avoid the sale.

But the admitted facts show positive breaches of trust; in fact, an absolute disregard of all duty toward the bondholders of 1870.

As has been seen, the State, after sequestering to its own use the earnings of the road, proceeded to exclude the bondholders of 1870 from all fair chance of protect-

ing themselves by purchase at the sale, and after such exclusion left it to the Governor to sell upon such terms as he might regard as "*consistent with the interest of the State*," whereas the original Act authorizing the endorsement required him to sell so as to "*best subserve the interests of all concerned.*"

Then followed the sale for $1,000,000 of property, which must have cost $4,000,000—and of this purchase price not one dollar, so far as appears, was ever paid to any one by the State, certainly not a dollar to the bondholders of 1870.

"It is a rule of equity jurisprudence, perfectly well settled and of universal application, that where property held upon any trust to keep, or use or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original *cestui que trust.*"

Cook vs. *Tullis*, 18 Wall., 332, 341.

The sale, therefore, by the State effected no valid or absolute conveyance, or change of beneficial interest. The rights of the *cestuis que trust* remained unchanged, subject of course to their proper assertion within due time, the State meantime remaining in law the trustee of the bondholders.

III.

The State having taken or gained no absolute, but only a voidable, title to the property, and the option to avoid the sale having been duly exercised by the bondholders of 1870, all subsequent holders of the property

are affected with notice of the infirmity of the State's title.

In point of fact, none of the several parties undertaking to convey this property have undertaken to warrant title. Their conveyances are, one and all, quitclaims.

Record, pp. 81, 83, 88, 93, 127, 136.

All purchasers of this property subsequently to its sale by the State, are chargeable with notice of the trust, and became in equity trustees for the bondholders of 1870.

In *Mechanics Bank* vs. *Seton*, 1 Peters, 299, it is said:

"It is a well settled rule in equity, that all persons coming into possession of trust property with notice of the trust shall be considered as trustees, and bound with respect to that special property, to the execution of the trust."

Here the entire series of acts which constitute breaches of trust by the State as trustee, as well as the fact that the State was a trustee and was undertaking to sell trust property, were public acts and facts proclaimed and done before all the public. The world was advised of the relations of the State to this property, of its repudiation of its obligations as endorser of the bonds, and of its duties as trustee for the bondholders of 1870, and of its intention to sell in disregard of these duties, and of the actual sale and its terms, which were in total disregard of the rights of the bondholders.

The pendency of this suit—begun September 29, 1877—at the time of the sale by the State to the Macon & Brunswick Railroad Company, February 28, 1880, was a continuing, special and additional notice to all subsequent purchasers, of the relations of the State to the bondholders of 1870, and of her trust obligations

toward this property. Purchasers must have purchased with actual or constructive notice of all that is now claimed by the appellants.

If, therefore, the State was a trustee, as we have contended, and if the State did sell, not in the interest of her *cestuis que trust*, but in her own interest ; or if the sale by the State left the option in the bondholders to set aside the sale, then subsequent purchasers have held and now hold the property as trustees for the bondholders, and the complainants here are entitled to have the property seized by the Court and subjected to the purposes of the trust as originally created.

IV.

It is asserted by the appellee that the State is an indispensable party to this suit.

It is of course conceded by the appellants that the State cannot be made a party, but it is denied that the State is now an indispensable party.

The present case is precisely the case put by this Court in *Chamberlain* vs. *St. Paul R. R.*, 92 U. S., 299, 306, thus :

"Where property passes to the State subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the Courts whenever the property comes under their jurisdiction and control. Thus, if property held by the Government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the Court to enforce the mortgage would attach as it existed previous to the acquisition by the Government. But where the property is not affected by any specific lien or trust in the

hands of the State, her transfer will pass an unencumbered estate."

Here is stated the exact doctrine of this case on this point.

While the property here in question was held by the State, as it was held when the original bill in this case was filed, September, 1877, the immunity of the State from suit made it impossible for the Court to reach it and subject it to the trust. The moment, however, when the property and title passed from the State to a private person or corporation, or in the words of this Court just quoted, "was transferred to an individual," the result was reached which is stated in the last named case; namely, that the jurisdiction of the Court to enforce the trust attached, as it would have existed if the Trustee had been a private individual.

Any other conclusion would involve the result that when property has once been held by the State, it cannot thereafter be subjected to the jurisdiction of the Courts in the same manner as other property.

It is asserted, however, that the State is still an indispensable party, because her rights are involved and must be passed upon in giving the relief sought by the appellants.

It is certainly no objection to the jurisdiction of the Court that the interests of the State are involved in some indirect or ultimate way.

Thus in *Cunningham* vs. *Macon and Brunswick*, 109 U. S., 451, it is said:

"It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the Court and under its control, in the regular course of judicial administration, and without being forcibly taken from the possession of the

Government, the Court will proceed to discharge its duty in regard to that property. And the State, if it chooses to come in as plaintiff, as in prize cases, or to intervene in other cases where she may have a lien or other claim on the preperty, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the Court" (citing *Clark* vs. *Barnard*, 108 U. S., 436).

To the same effect it was held by this Court in *Christian* vs. *Atlantic & N. C. R. R.*, 133 U. S., 233, 234. "There is class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding, without making it a party. Cases of this sort may arise in Courts of Equity where property is brought under its jurisdiction for foreclosure or some other proceeding, and the State *not having title in fee or the possession of the property*, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the praperty will not be prevented by the interest which the State has in it; but its right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations."

This doctrine is clear. If the State has interests involved in property otherwise subject to the jurisdiction of the Courts, the State may always appear and assert its rights and defend its interests. It is only (1) when the State or its officers are made parties to a suit, or (2) when the title or possession of the property involved in a suit is in the State, that the State can set up its immunity or be regarded as an indispensable party. Thus, in *Cunningham* vs. *Macon & Brunswick*, it was said, as the grounds for holding the State to be an indispensable party, that "No foreclosure suit can be

sustained without the State, because she has the legal title to the property and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in actual possession of the property, and the Court can deliver no possession to the purchaser."

The cases of *Clark* vs. *Barnard*, *supra*, and *Georgia* vs. *Jesup*, 106 U. S., 458, illustrate further the same doctrine.

In the present case, it is not claimed by the appellee that either the title or possession of the property involved is now in the State, or that the Court could not now give title and possession to the property by force of its decree.

Whatever interests the State may have in the result of this suit—and we do not undertake to point them out or to deny that they may be important—all such interests can be, or could have been, protected by the appearance of the State in the suit. It is only by her voluntary choice that she has not so appeared up to the present time.

There is, therefore, no ground for regarding the State as a indispensable party in this suit.

It is further asserted by the appellee (1) that the Act of 1870 under which the complainants bonds were issued is in conflict with the Constitution of Georgia; and (2) that as a result the indorsement and lien of 1870 were invalid; and further that the presence of this issue so affects the rights and interests of the State as to make her an indispensable party.

1. There are many grounds on which the validity of the Act of 1870, may be defended; but the answer to the claim of its invalidity here is nearer at hand. It is this: conceding that the endorsement of the bonds of 1870 is invalid, it does not follow that the lien reserved

by the State in the Act of 1870 for the security of the payment of these bonds, is invalid. On the contrary, the lien will stand unaffected by the validity or invalidity of the endorsement.

This is well shown in the case of *Railroad Companies* vs. *Schutte*, 103 U. S., 118. In that case, the State of Florida passed an Act authorizing the issue of State bonds to railroad companies in exchange for the companies' bonds, and the State took a statutory lien on the property of the railroad companies, the proceeds of a sale of said property to be applied to the payment of the bonds of the State so issued to the railroad company.

This Court held, first, that the statutory lien here in question was given for the security of the holders of the State bonds.

It was shown that the State Courts of Florida had held the acts authorizing the exchange of the State bonds were unconstitutional, and it was strongly urged that if the State bonds were void, the lien secured by the same acts was also void.

The Court, however, held that the validity of the lien for the payment of the State bonds was not dependant on the validity of the bonds ; that the object being to aid the companies to borrow money and the money borrowed being, as between the State and the companies, the debt of the companies, and the lien reserved being for the security of the payment of the money borrowed, the validity of the lien did not depend on the validity of the bonds. " The bonds, as State obligations, were void," says the Court, " but as against the company which had actually put them out, they were good."

Applying this case to our own, the endorsement here by the State in 1870 may be invalid, and the State may not be bound thereby, but the lien given by the Company as idemnity to the State is still a valid security for the payment of the Company's bonds. In other words, the lien as an indemnity to the State may fail upon the failure of the State's endorsement ; that is, the

lien may be invalid as to the State by reason of the constitutional invalidity of the endorsement, but will remain valid as a security in the hands of the State for the payment of the company's bonds.

2. As to the claim that the decision of the Court in the present suit, upon the question of the validity of the endorsement of 1870, renders the State an indispensable party, the answer has already been given. The appellants ask and desire nothing of the State. If the State fears the consequences to follow from the decision of any question involved in this case, the State has only to appear and ask a hearing.

The appellants ask only the foreclosure of a lien on property to which the State claims no title, and of which the State is not in possession. The decree of the Court can effect all the appellants ask without affecting title or possession of any property claimed by the State.

It is claimed that the Supreme Court of Georgia has decided the sale by the State and the title of the purchaser to be good, in the case of *Wood* vs. *Macon and Brunswick R. R. Co.*, 68 Ga., 539.

This is a mistake, except as to third parties; that is, parties having no interest in the relations here in question between the State, the Railroad Company and the bondholders of 1870. It is not questioned by the appellants that the sale and title are good as to such parties, but this concession does not at all affect the questions here involved between the present parties.

CONCLUSION.

The case is therefore this:

(1.) Under authority of the Act of 1870, the State of

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CONCLUSION.

The case is therefore this:

(1.) Under authority of the Act of 1870, the State of

Georgia became the trustee of property to be held for the payment of appellants' bonds.

(2.) In disregard of her duty as trustee the State sold the trust property to herself and solely in her own interest.

(3.) So long as the title and possession of this property remained in the State, the State was an indispensable party, and the appellants were remediless in the Courts.

(4.) When the property passed from the State to private hands, the appellants were entitled to enforce their remedies in the Courts.

(5.) All purchasers from or through the State were purchasers with notice of the appellants' rights.

(6.) The Court having now jurisdiction to enforce appellants' rights without rendering any judgment against the State or its officers, the indirect interests, however extensive, of the State are not a bar to the relief sought, the State having her ample protection by appearing in the Courts and asserting her rights.

(7.) Conceding the unconstitutionality of the State's endorsement, the lien in favor of the bondholders of 1870 is unaffected.

Reply to Appellee's Brief.

It is important to note and keep in mind the following dates:

(1.) The default in interest and the seizure of the road by the State took place in 1873.

(2.) The sale of the road *to* the State took place in 1875.

(3.) The original bill of complaint was filed in 1877.

(4.) The sale of the road *by* the State took place in 1880.

(5.) The appeal to this Court from the decree in the original bill was decided in 1885.

(6.) The conveyance to the present holder and defendant took place July 1, 1886.

(7.) The supplemental bill in this case was filed Dec. 30, 1886.

(8.) The deed by the State to the M. & B. R. R. Co. is dated February 28, 1880.

I.

The appellee in his printed brief insists that the State is an indispensable party; and hence, that the decree below should be affirmed without further consideration.

He refers to the decree below as stating, "very briefly, but very clearly," the nature of this controversy. It is well, therefore, to observe that the Court below does not put its decree to any extent upon the ground that the State is an indispensable party, but solely on the ground that the sale made by the State was a valid one, made under a statute which the State was competent to pass.

The appellee places his claim that the State is an indispensable party on three grounds:

First.—The authority of two decisions by this Court, —*Cunningham* vs. *M. & B.*, 109 U. S., 446, and *Christian* vs. *Atlantic & N. C. R. R.*, 133 U. S., 234.

Neither of these cases supports the claim.

In *Cunningham* vs. *M. & B.* (1) the title to the prop-

erty, and (2) the possession of the property, were in the State at the time the suit was brought.

This Court decided two points: (1) that the suit as it stood, was a suit against the State; and (2) that the State was an indispensable part. The decision of this Court on the latter point is put distinctly and wholly on the grounds; (1) that no foreclosure suit can be sustained without the State, because the State has the legal title; (2) the Court cannot deliver possession, because the State is in actual possession of the property (p. 457).

In *Christian* vs. *Atlantic & N. C. R. R.*, the State having subscribed for certain stock in a railroad company, and having issued bonds of the State in payment therefor, had pledged or mortgaged said stock and the dividends thereon, to secure the payment of said State bonds. The owner of some of these State bonds on which default had occurred, sought to enforce a lien against this stock, and to have it sold, and its proceeds and the dividends thereon applied to the payment of his own and like bonds.

Here, again, this Court put its decision that the State was an indispensable party distinctly on the ground that the property sought to be reached was the property of the State, and in the possession of the State (p. 241).

In each of these cases the tests are the direct interest of the State, arising from the fact of the State holding the title, and being in possession of the property in question.

In our case the State does not hold title, and has not the possession, and if the State has any interest at all, it is indirect and ultimate only.

But the appellee is driven to claim, as he does, that the immunity of the State from suit extends to the grantees of the State. He declares in terms that:

"The State's title is necessarily incapable of attack in the hands of its grantees."

Certainly this is a tremendous stride. Heretofore we have understood that when the State's interest is direct and primary, as when the State has actual title and possession of the property, the State is an indispensable party, and is shielded from suit. But now we are told that this immunity extends to the State's grantees; that is, to all parties who may derive title from or through the State.

The appellee says this is necessary, because otherwise the State cannot sell except at a price diminished by the risk that the title may be attacked in the hands of the purchaser. But is this any other or greater burden than every seller of property is subject to? The buyer in all cases must look to his seller's title; and the seller must in all cases see to it that his title is sound, if he expects a sound price.

The invariable rule of equity is that when trust property is sold in violation of the trust, any purchaser having notice, actual or constructive, of such violation, becomes in law the trustee of such property and holds it subject to the purposes of the trust, and the Courts will enforce the trust as if there had been no sale.

Here, in 1877, the State had sold in violation of its trust, as we now assert, but she held the title, and was in possession of the property, and she pleaded her immunity from suit, and the complainant could not reach the property. Now, the property has passed to other parties who have no immunity, and equity will now treat such parties as the trustee and enforce the trust against the property.

The claim of the appellee is, indeed, monstrous. It amounts to this: if the State seizes and holds a citizen's property, no matter how completely in violation of all law and right, the State not only cannot be sued, but the State can give an indefeasible title to such property, title which can never thereafter be questioned in the Courts.

Second.—The appellee next says, the appellants are in the dilemma : (1) that the sale is valid and the appellants are remitted to their share of the purchase money, which is in the State Treasury and cannot be reached by the Courts ; or, (2) that the sale is invalid, in which case the title is still in the State, and cannot be reached by the Courts.

The plain answer to this is that the sale made by the State is presumably good as to all parties except the *cestuis que trust* of the trust property. If the sale has been made in violation of the trust, they can only set it aside or enforce the trust. The Court will regard the sale as valid as to all parties who do not complain, and will leave those who do complain to show the invalidity of the sale as to them.

Third.—The appellee says next that the sole power of sale of the property, if it be trust property, is given by the Acts of 1866 and 1870, to the State ; and that the Court cannot, therefore, subject the property to the trust without making the trustee a party.

Equity has better methods than this ; equity regards the purchaser of trust property sold in violation of the trust as the trustee, and will subject the property in his hands to the trust. It is not necessary to set aside the sale or restore title or possession to the original trustee ; if the Court can trace and fix the property, whoever holds it is the trustee.

II.

The appellee claims that the bonds of 1870 are not secured by any lien on property, even if the bonds of 1866 were so secured, but only by the State's endorsement.

This claim is based on the fact that the Act of 1870

merely authorizes the endorsement of $3,000 per mile additional, and does not in terms repeat the provisions of the Act of 1866, in respect to the lien.

The Act of 1870 is an amendment, in terms, of the Act of 1866. The two Acts, from the date of the passage of the amendment of 1870, became in law one Act, and all the provisions of the Act of 1866, applied to the bonds endorsed or authorized to be endorsed under the Act of 1870. By the Act of 1866, as amended, the Governor was thus authorized to endorse $3,000 of bonds per mile in addition to the original $10,000 per mile, and the lien of 1866, in all respects covered the additional bonds thus endorsed or authorized to be endorsed.

Holbrook vs. *Nichol*, 36 Ills., 161, 167.
McKibben vs. *Lester*, 9 Ohio St., 627.

The appellee says grants to individuals by the State cannot be implied.

But there is no place here for implication; the Act, as amended, in express terms, applies the lien to the additional bonds of 1870.

III.

The appellee claims that if our theory is sound it will result that the original lien, which was made to cover only $10,000 per mile, will be made to cover $13,000 per mile, and that this will be unlawful, and a violation of the contract with the holders of the original $10,000 per mile of endorsed bonds.

If this were so, the only parties interested would be the holders of the original $10,000 per mile of endorsed bonds of 1866, none of whom are setting up such claim.

IV.

The appellee claims that the lien reserved by the Act of 1866 was for the indemnity of the State alone.

For this he relies in part on Judge Bradley's opinion in *Branch* vs. *M. & B. R. R.*, 2 *Woods*, 385, where this lien is referred to as a lien "by way of indemnity to the State." While the Court in this case had no occasion to pass upon the present question, and did not pass upon it, it is significant that the Court after alluding to the lien as one "by way of indemnity to the State," uses the following language:

"The ground on which the complainant claims a right to have the road and other property of the company seized and applied to the payment, as well of the second issue of bonds as of the first, is the well-known rule of equity, that a security given by way of indemnity to a surety may be reached and applied directly to the payment of the debt, and the surety cannot prevent such application."

The Court then states that the "great difficulty in this case arises from the fact that the surety is the State of Georgia, and that the State is by its agents and officers in possession of the property given by way of indemnity." The Court proceeds to say:

"In this case the railroad in question is as much in possession of the State itself as is the State House or any other property belonging to it. * * * The Court is asked to make a decree operating directly upon the rights of the State and transferring them to the complainant and the other bondholders. * * * We think this cannot be done without making the State a party to the suit, which cannot be done."

It will be seen that this case was heard and decided in 1875, while the State was in actual possession of the property in question. There is nothing in the case,

however, which is opposed to the present claim of the appellants, but on the contrary, much which supports their claim.

The appellee proceeds to examine the terms of the Act of 1866, and regards the words therein used—"the security of the State,"—and the words, "vesting the title in the State"—as well as the condition of the defeasance,—"until all the bonds so endorsed shall be paid," as showing the intention of the Act to limit the security to the indemnity of the State.

The view of the appellants, on the contrary, is that while the indemnity of the State against liability on her endorsement was one undoubted purpose of the lien, the vesting of the title in the State, and the condition that the lien should remain "until all the bonds shall be paid," plainly point to a security to be held by the State for the payment of the bonds of the Company; in other words, a trust for the security of the bondholders.

Add to this fact (1) that the lien was to be enforced *upon information given by the bondholders;* (2) that the earnings of the road in the hands of the State were to be used *to extinguish the bonds and coupons;* and (3) that the sale was to be made so as to *best subserve the interests of all concerned*, and we have convincing, if not conclusive, proof of the soundness of our conclusion that the lien was for the security of the bondholders, as well as by way of indemnity to the State.

In addition to all this, the appellants, as has already been said, regard the mortgage made by the M. & B. R. R. Company in July, 1870 (*Record*, folios 29–35), as giving strong and clear proof of the same intention. One of the recitals of this mortgage is, "the said Macon & Brunswick R. R. Company are desirous of confirming the lien created by the aforesaid Act (*i. e.*, of 1866) *in favor of the said bonds so endorsed as aforesaid.*"

This mortgage was made by the Railroad Company,

and accepted by the State, a contemporaneous declaration of intent and purpose made by the chief parties to the transaction. Certainly no evidence could well be higher than this of the aim and meaning of the Act of 1866.

V.

The appellee proceeds to urge that in other cases involving similar liens this Court and other Courts have held adversely to the appellant's claim.

The case of *Hand* vs. *S. C. & R. R.*, 12 S. C., 314, may first be noticed here.

An Act of the State of South Carolina provided for the endorsement by the State of the bonds of the Railroad Company, and provided that the bonds so endorsed should constitute a lien, and the State of South Carolina "from the endorsing of the said bonds and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds with the interest."

Upon this language the Court held that, the bonds so endorsed "constituted a lien upon the entire road which not merely enured as an indemnity to the State against its guaranty, but vested in the State as well for its own protection as for the better security of the bonds and their coupons into whosoever hands they might fall, and not available to either one of the protected parties to the exclusion of the other."

Here a lien vested in the State for the indemnity of the State against its guaranty is held also to be a security equally available to the bondholders of the Railroad Company for the payment of their bonds.

In *Chamberlain* vs. *St. Paul*, 92 U. S., 299, the appellant held bonds of the State of Minnesota issued to

a Railroad Company. The Railroad Company also received certain lands from the State. To secure the payment of the State bonds so issued, the State took a conveyance of the lands in question and an amount of the Railroad Company's bonds equal to the State bonds so issued.

It was held by this Court that the bonds being State bonds, the State was the principal debtor, and the security was taken for the benefit of the State alone. The State was in no sense a surety taking security against its guaranty of another's debts.

Hence, the Court held that the appellant, the bondholder, had no claim upon the property held by the State for its own security.

In this case the Court fully asserts the doctrine that where a surety takes security against its guaranty, the security so taken becomes a trust fund for the benefit of the principal debtor. In the Chamberlain case, there was no trust or lien in favor of the bondholders of the State, because there was no guaranty by the State of the debt of another, but merely a security taken for its own indemnity.

In our present case, the endorsement by the State of the Macon & Brunswick bonds established the relation of principal debtor and surety between the State, the bondholders, and the Railroad Company; and hence the security taken, if taken for indemnity of the State, became also a security for the payment of the principal debt.

In *Railroad Companies* vs. *Schutte*, 103 U. S., 118, the State of Florida issued State bonds in exchange for bonds of Railroad Companies, and to secure the payment of the railroad bonds, took a lien which was expressly made a lien in favor of the bondholders.

This Court held that this lien directly and not by way of subrogation, enured to the benefit of the hold-

ers of the State bonds given in exchange for the railroad bonds.

Again in the *Tennessee Bond Cases*, 114 U. S., 663, the State issued State bonds directly in aid of railroads, and took a lien to secure the payment of the loans so made. The State here was the principal debtor on its own bonds. No relation of surety existed.

The Court held the lien was for the benefit of the State alone and not of the bondholders of State bonds issued to the Railroad Companies.

The case of *Murdock* vs. *Woodson*, 2 Dillon, 188, is in all respects parallel in principle with the Tennessee Bond Cases.

Through these and all other similar cases runs the principle that when the surety secures himself by taking funds from the principal debtor, such funds are likewise available in favor of the creditor for the payment of the, principal debt.

If therefore by the Acts of 1866 and 1870, the State of Georgia assumed the relation of surety and indemnified herself by taking security from the principal debtor, such security is available by the creditor for his payment.

VI.

The appellee asserts that the bondholders of 1876 held no specific lien by law or contract, and hence that the State could convey a clear title; and he relies on *Chamberlain* vs. *St. Paul* to support this position.

In that case, as has been seen, the State was not a surety, but the principal debtor; and hence the creditor had no lien or equity upon the property taken for the security for the State's own direct loan of its own bonds.

But if we are right in regarding the State of Georgia here as surety, the Railroad Company as the principal debtor, and the lien as a security taken to indemnify the State, then in equity the property covered by such lien becomes a trust fund, a fund charged with a specific trust, "a specific lien or trust" in the hands of the State, and such lien or trust passes with the property conveyed by the original trustee in violation of the trust.

VII.

The appellee urges that the sale by the State cut off the rights of the bondholders.

We have already called attention to the fact that the Governor was required by the Act of 1866, "to sell in such manner and at such time as in his judgment may best subserve the *interests of all concerned*," as well as to the indisputable fact that he did not so sell, but sold in accordance with the subsequent direction of the Legislature in such manner "as in his judgment was consistent with the interests of the State."

The right to sell according to one's judgmens is not a right to sell in disregard of the rights and interests of the parties beneficially interested. An honest and fair exercise of judgment is always necessary, and of the fairness of such exercise of judgment, the Court will judge for itself.

If the manner of the sale was substantially fraudulent as to the bondholders, as we insist it was, and as we

think we have shown, how can it be asserted that the sale cut off the rights of the *cestuis que trust?* It did not. On the contrary, it had no effect as to bondholders, except to transfer the property into new hands, but covered still by the same trust a new trustee but the old trust.

We do not say that the State could not sell. It could sell, but in selling it was bound to sell "for the best interests of all concerned," and to apply the proceeds to the purposes of the trust, namely, the payment of the bonds.

VIII.

The appellee asserts at much length, that the State was not forbidden to buy at the sale of the road in 1875.

We have no occasion to dispute this position. All we say is, a fraudulent sale or sales conducted by the Trustee in plain and avowed disregard of the rights of the *cestuis que trust* is no sale, passes no right or interest as to the *cestuis que trust;* and that a sale made in the best of good faith by a trustee to himself, is voidable at the option of the *cestuis que trust.* Does the appellee claim otherwise? Undoubtedly the Legislature may authorize a sale, and may authorize a trustee to buy, but the Legislature cannot authorize the Governor to make a fraudulent sale or a sale in violation of the rights of these bondholders, and thereby deprive them of their rights under the Acts of 1866 and 1870; nor could the Legislature in this case authorize the Governor to buy the trust property for the State, except subject to the right of the *cestuis que trust* to use their option to repudiate the sale.

IX.

The claim of the appellee that the bondholders of 1876 must offer to redeem does not require attention.

As has been sufficiently shown, if the State has sold here in violation of the rights of the bondholders, the sale has no force as to them. They have nothing to do except to ask still for the foreclosure of the lien in their favor on the property in its present hands.

X.

As to prescription.

What are the facts?

The sale in this case took place June 2d, 1875.

This suit was begun September 29th, 1877.

It was pending in the Court below and in this Court till October 21st, 1885.

The property was conveyed to the present defendant, the East Tennessee, Virginia & Georgia Railway Company, July 1st, 1886.

The supplemental bill, making the East Tennessee, Virginia & Georgia Railway Company a party defendant, was filed December 3d, 1886.

The conveyance by the State to the M. & B. Railroad Company took place February 28, 1880.

Adverse possession in Georgia requires seven years to perfect title.

Suit here was brought against the parties in possession within two years from the date of the first claim of title, or adverse possession by the State under the sale by the Governor.

This suit has been steadily prosecuted since the filing of the original bill, the supplemental bill having been

filed within six months from the first claim of title or adverse possession by the defendant, the East Tennessee, Virginia & Georgia Railway Company, and in less than six years after the first sale by the State.

D. H. CHAMBERLAIN,
For the Appellants.

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136-400

JAMES H. McKENNEY
CLERK

136-400

Supreme Court of the United States.

OCTOBER TERM, 1894.

GEORGE A. CUNNINGHAM AND JOHN P. BRANCH,
Complainants-Appellants,

against

THE MACON AND BRUNSWICK RAILROAD COMPANY AND OTHERS,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

ARGUMENT OF GEORGE HOADLY

FOR THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, DEFENDANT-APPELLEE.

Supreme Court of the United States.

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GEORGE A. CUNNINGHAM and JOHN P. BRANCH,
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against

THE MACON AND BRUNSWICK RAILROAD COMPANY and others,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Argument of George Hoadly,

for the East Tennessee, Virginia and Georgia Railway Company, Defendant-Appellee.

Statement of Case.

This is an appeal from a decree of the Circuit Court for the Southern District of Georgia dismissing the bill (Record, p. 154.)

This is the second time this case has been in this Court. When the suit was originally brought, the State of Georgia, through its officers, was in possession of the Macon and Brunswick Railroad. An injunction and Receiver having been refused by Judges BRADLEY and ERSKINE, (2 Woods, 385; see also opinion of Judge WOODS, when Circuit Judge, sustaining demurrer of Governor COLQUITT, 3 Woods, 424,) and the bill as to the State officers dismissed, an appeal was taken to this Court, which resulted in an affirmance. The opinion is reported in 109 U. S. 446, that a suit of this character cannot be maintained against a State or its officers.

The mandate having been filed in the Circuit Court, and the East Tennessee, Virginia and Georgia Railway Company, having acquired title and possession by purchase from the State, a supplemental bill was filed against it December 30, 1886 (Rec. 49). The E. T., Va. & Ga. Co. filed its answer (Rec. 58–70), with exhibits (Rec. 70–145), whereupon the cause came on to be heard upon these pleadings, and the general replication of the complainants. The only testimony was by stipulation admitting the execution of Exhibit B to the original bill of the bonds sued on, of all the exhibits attached to the answer, and of the letter annexed to the bill marked Exhibit F.

The bill was originally filed by George A. Cunningham, for himself and others in like interest, who might join in its prosecution, as the holder of nineteen of the bonds hereinafter described, and John P. Branch was afterwards admitted co-complainant (June 28, 1890, Rec. 153), as holder of twenty-five of the same series of bonds. Upon this

record, the cause was heard at the May Term, 1890, and the bill dismissed, with allowance of appeal. I quote from the decree because it very briefly, but very clearly, states the nature of the present controversy (Rec. 154):

"The Court, considering that the sale made by the State of Georgia of the Macon & Brunswick railroad property on the 1st Tuesday of June, 1875, having been made according to a statute passed by the Legislature of the State of Georgia prior thereto, which it was competent for such Legislature to make, was a valid sale, and as such divested the complainants of all liens and equities that may have existed in their favor as bondholders of the Macon & Brunswick Railroad against the property of the Macon & Brunswick Railroad Company, it is

ORDERED, ADJUDGED AND DECREED, that the bill herein be dismissed with costs, to be taxed."

The appeal having been perfected, the cause now comes on to be heard upon its merits:

On the 3d of December, 1866, the Legislature of Georgia passed an act entitled:

"An act to extend the aid of the State to the completion of the Macon and Brunswick Railroad and for other purposes."

This act authorized the Governor, (Sec. 1,)

"To place the endorsement of the State on the bonds of the Macon and Brunswick Railroad Company, which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to wit: Before any such endorsement shall be made,

the Governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens or mortgages, or other incumbrances, which may in any manner endanger the security of the State, and upon the further condition and express understanding that any endorsement of said bonds, when thus made, shall not only vest the title to all property of every kind which may be purchased with said bonds in the State, until all the bonds so endorsed shall be paid, but the said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all of the property of the company, to be enforced as hereinafter provided for."

The second section is in the following words:

"In the event any bond or bonds endorsed by the State, as provided in the first section of this act, or the interest due thereon, shall not be paid by said railroad company at maturity, or when due, it shall be the duty of the Governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all of the property of said railroad company, and apply the earnings of said road to the extinguishment of said bond or bonds or coupons, and shall sell the said road and its equipments and other property belonging to said company in such manner and at such time as in his judgment may best subserve the interest of all concerned."

Under this act, the Governor endorsed bonds to the amount of one million nine hundred and fifty thousand dollars, which were afterwards negotiated by the Company (Record, 2).

Afterwards, on the 22d day of June, 1870, the Macon and Brunswick Railroad Company executed and delivered a mortgage to the then Governor of the State of Georgia, and his successors in office and assigns forever, of all its railway property,

equipment and franchises, with a condition of defeasance, upon payment by the Railroad Company, its successors or assigns, of the—

"Said principal sum of money mentioned in the condition of the said bonds or obligations, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof."

This mortgage is Exhibit A to the bill and appears at page 12–14 of the Record.

This mortgage recites the passage of the act of December 3, 1866, its contents and purport, the actual endorsement by the State, in pursuance of the act, placed on certain of the bonds of the company, amounting in the aggregate to $1,950,000, and continues:

"And whereas the said The Macon and Brunswick Railroad Company are desirous of confirming the lien created by the aforesaid act in favor of the holders of said bonds so endorsed as aforesaid."

This purpose is again recited in the words immediately following the above quotation, thus:

"*Now, therefore, this Indenture witnesseth*, that the said The Macon and Brunswick Railroad Company, parties of the first part, for the purpose of confirming the aforesaid lien and the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations above referred to and endorsed as aforesaid with interest thereon. * * * ."

It is also provided in the condition of defeasance that—

"If default shall be made in the payment of the

said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, * * * it shall be lawful for the said party of second part, his successors in office and assigns, to seize and take possession of all the hereinbefore described property, * * * and to sell the said road and its equipments and other property belonging to the said Macon and Brunswick Railroad Company in such manner and at such time as, in his judgment, may best subserve the interests of all concerned, and as the attorney of the said parties hereto of the first part, for that purpose by these presents duly authorized, constituted, and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due upon said bonds or obligations, together with the costs and charges of advertisement and sale of the said premises, rendering the surplus of the said purchase money (if any there shall be) unto the Macon and Brunswick Railroad Company, parties of the first part, their successors or assigns, which sale so to be made, shall forever be a perpetual bar, both in law and in equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises or any part thereof by, from or under them, or either of them."

At the time this legislation took effect the Macon and Brunswick Railroad Company was fully authorized to borrow money and mortgage its railway, property and franchises to secure the same. This is shown by the following legislation:

First. The Macon and Brunswick Railroad Company was incorporated by the third section of an Act, approved March 1, 1856—

"To amend the several Acts of the General Assembly of the State of Georgia relating to the Savannah and Albany Railroad Company,"

and for other purposes enumerated in the title, and unnecessary to be here set forth in full,

"with all the rights, privileges and immunities granted to the Brunswick and Florida Railroad Company by their act of incorporation, and the several acts amendatory thereto, and that the provisions of the aforesaid Brunswick and Florida Railroad charter be, and the same is, made a part of this charter so far as is applicable to the same."

Secondly, by the Act of December 27th, 1838, amending the charter of the Brunswick and Florida Railroad Company, that company was authorized to issue bonds,

"Which shall be binding on the property of the company, and on such other property belonging to the stockholders as they may pledge to said company by mortgage to meet their own engagements or the engagements of said company."

Thirdly, by an Act of the Legislature of Georgia, approved December 17th, 1857, entitled:

"An Act to amend the charter of the Macon and Brunswick Railroad Company, and to define more particularly the powers and privileges of said company, and for other purposes therein named."

the Act of March 1, 1856, incorporating the Macon and Brunswick Railroad Company, was confirmed and re-enacted, and the action of the stockholders and incorporators thereunder confirmed and made valid.

The *fourth* section of this act confers upon the M. & B. Company:

"All the rights, privileges and immunities

granted to the Central Railroad and Banking Company, and subject to the same liabilities imposed upon said company, so far as the same may be applicable."

Fourthly, By the first section of the Act to incorporate the Central Railroad and Canal Company, (name changed December 14th, 1835, to Central Railroad and Banking Company), that corporation was made,

"capable in law to buy, hold and sell real and personal estate, make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated."

Fifthly, by the second section of an Act, assented to December 19th, 1860, entitled

"An Act to facilitate the construction of the Macon and Brunswick Railroad,"

it was enacted as follows:

"That it shall be lawful for said company to acquire steamships and other vessels, and all other property, real and personal, and to hold, use, sell or mortgage the same, to aid in the execution of its railroad, and the business of the company."

On the 27th day of October, 1870, an Act was passed, entitled

"An Act to amend an Act to extend the aid of the State to the completion of the Macon and Brunswick Railroad, and for other purposes."

This Act recites that the railroad has been completed to Brunswick at a greater outlay than was contemplated; that the State, by recent legislation, had endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile; and thereupon it was enacted

"That the above-recited act be so amended as to authorize the Governor to place the endorsement of the State, to the extent of and three thousand (dollars) per mile, upon the bonds of said Macon and Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory.

Before the passage of the Act of October 27th, 1870, a new Constitution had been adopted by the State of Georgia, viz., in 1868, containing the foling provision, (Article 3, Section 6, Clause 5, Subclause 3):

"The General Assembly shall pass no law making the State a stockholder in any corporate company; nor shall the credit of the State be granted, or loaned, to aid any company without a provision that the whole property of the company shall be bound for the security of the State, prior to any other debt, or lien, except to laborers; nor any company in which there is not already an equal amount invested by private persons; nor for any other object than a work of public improvement."

Under the Act of October 27th, the Governor endorsed the bonds of the State to the extent of six hundred thousand dollars (Record 2, 60). Of these bonds the complainant is a holder of nineteen (and John P. Branch of twenty-five,) but brings

this suit as well for all other holders of the same series of bonds,—

"who may choose to be made parties hereto and bear their *pro rata* of expense,"

as for himself.

On the 14th of August, 1872, the General Assembly of Georgia passed a joint resolution in the following words :

"That the State's guarantee placed on the bonds of the Macon and Brunswick Railroad Company is binding on the State."

On the 17th of February, 1873, another act was passed by the General Assembly of Georgia, providing that—

"If, under the law granting State aid to railroad companies, the same are sold on account of non-payment of the interest accruing on bonds indorsed by said State, it shall be lawful for the Governor of the State to buy such roads, their rolling stock, fixtures, equipments and appurtenances for the State of Georgia, and, when so bought, to make such disposition of said roads as may be most conducive to the interests of said State, not amounting to a sale thereof, and such disposition to be subject to the revision and approval or disapproval of the next General Assembly thereafter."

The Macon and Brunswick Railroad Company having failed to pay the interest accruing on its bonds endorsed by the State, the then Governor of Georgia, on or about July 6th, 1873, seized the railroad and other property of the Company and appointed Edward A. Flewellen as Receiver, and he operated the road in the interest of the State. (Record, 4, 61, 62).

On the 5th of March, 1875, a further act was passed in the premises, reciting that:

"It is provided in the acts authorizing the State to endorse the bonds of certain railroads, and upon the happening of certain contingencies therein specified, to seize and sell the same; and whereas, there is no authority given by law to protect the State in case any of the said roads were likely to be sacrificed under said sales, for remedy whereof,"

it was enacted by the first section:

"That whenever any railroad having the State's endorsement upon its bonds shall be brought to sale under the laws in force touching the same, the Governor shall be and he is hereby authorized and empowered, in the name of the State, to bid for and to buy the same, if at such sale the said railroad is likely to be sacrificed or sold for an amount less than its intrinsic value, and of which he shall be the judge; provided, the Governor shall in no case bid a larger amount for said road than the State's legal liability."

Other provisions of the same act were to the effect that the Governor should, in case of such purchase, appoint,—

"Three discreet and responsible persons, who shall take charge thereof as a Board of Directors, with full and ample power to manage the same. * * * Said board, when so appointed, if in their soundest discretion they shall deem it best for the interest of the State to sell, to lease, or run the same, they are hereby authorized and intrusted with plenary power therefor, upon such terms and time as will yield the greatest amount of money wherewith to relieve the State from its liability; provided, however, that no sale or lease shall be binding upon the State until the same shall have the approval in writing of the Governor endorsed thereon."

Before the passage of this act, viz.: on January 20, 1875, a joint committee had been appointed by the General Assembly—

"To make a thorough investigation of all the bonds of said Macon and Brunswick Railroad Company, upon which the State's endorsement has been placed, to the end that it may be ascertained whether the law under which the company procured the State's endorsement has been complied with or not; if not, to what extent, and if illegally obtained, whether the present holders are properly chargeable with notice of the wrongdoing."

As the result of this investigation, the following joint resolution was passed by the General Assembly and approved by the Governor, March 6th, 1875:

"That the State's endorsement upon the first mortgage bonds of the Macon and Brunswick Railroad to the amount of one million nine hundred and fifty thousand dollars ($1,950,000), issued under an Act approved the third day of December, 1866, is valid and binding upon the State, and the State's liability thereon is hereby recognized and affirmed.

Resolved further, That the State's endorsement upon the bonds of the Macon and Brunswick Railroad, issued under an act approved October 24, 1870, be, and the same is, hereby declared unconstitutional, null and void.

Resolved further, That it is the sense of this General Assembly that the Macon and Brunswick Railroad, with its franchises, equipments and appurtenances, be sold by the Governor at an early date, and if found to be practicable, as early as the first day of June, 1875, at public or private sale, and upon such terms, and for such price, in money or first mortgage endorsed bonds of the Macon and Brunswick Railroad, or bonds of the State, as in his judgment may be consistent with the interest of the State; provided that no commissions or percentage shall be authorized or allowed in said sales."

On the first Tuesday of June, 1875, in pursuance of an executive order, a copy of which is attached to the answer, dated April 5, 1875 (Record, 70, 72), Governor Smith sold the Macon and Brunswick Railroad,

"and its equipments and other property belonging to said company,"

at public auction through the agency of Edward A. Flewellen as Receiver, after due advertisement.

The executive order and advertised notice of sale stated that the property would be offered,

"for cash, for bonds of the State, or the first mortgage bonds of the company endorsed in behalf of the State under the authority of the Act approved December 3, 1866."

At such sale the entire property was bid in and bought by the Governor, in the name of and for the State of Georgia, for the sum of one million dollars, and a deed conveying the same to the State was executed by the Governor, dated June 3, 1875, a copy of which is attached to the complainant's bill (Record, 24–27).

Issues are made by the averments of the bill and denials of the answer as to the regularity and integrity of this sale.

In view of the decision of the Supreme Court of Georgia, sustaining this sale, in *Wood* vs. *Macon and Brunswick Railroad Co.* 68 Ga. 539, it is not now anticipated that any serious defect can be found in the exercise of the power of sale and purchase by the State.

On the 26th of February, 1877, by joint resolution, the whole subject of the sale or lease of the Macon and Brunswick Railroad Company was postponed until the next session of the General Assembly, and the Governor instructed to make no sale or lease until the next session, and—

"in the meantime that he continue to run the road, upon the best terms he can, for the interest of the State."

By acts passed September 3d, 1879, and October 4th, 1879, the Governor was authorized to lease the Macon and Brunswick road at public vendue, and the lessees to form a new incorporated company under the name and style of the Macon and Brunswick Railroad Company, for the purpose of operating the road under such lease, with further power to build a railroad from Macon to Atlanta, from Hawkinsville to Americus and from Brunswick or any other point on the said railroad in Glynn County to the Florida line; and it was further provided that when the railroad had been built by the lessees from Macon to Atlanta, or a connecting link between the Georgia Railroad and the Macon and Augusta Road, with a joint company contract over such roads so as to extend the lines into Atlanta, that said lessees should—

"have the right and option of purchasing the Macon and Brunswick Railroad for the sum of one million one hundred and twenty-five thousand dollars, to be paid in the recognized bonds of the State of Georgia."

The acts contain further details with regard to

the time and manner of making such payment and the security to be retained by the State in such case.

On February 28th, 1880, under the authority of this legislation, Governor Colquitt executed a lease to the Macon and Brunswick Railroad Company, created in pursuance thereof, reciting compliance in detail with these statutes and granting the privilege of purchase as aforesaid (Record, 73–76). On the same day, and in pursuance of the same legislation, the same Governor of Georgia conveyed said railroad to the Macon and Brunswick Railroad Company (Record, 77–80).

As these two deeds were, as is supposed, in strict accordance with law, no further reference to them is necessary here.

On the 14th of June, 1881, the Macon and Brunswick Railroad Company, in pursuance of law, sold and conveyed said property, with its additions, accretions and betterments, to the East Tennessee, Virginia and Georgia *Railroad* Company, which went into immediate possession thereof. (Record, 81–83). By subsequent intermediate conveyances, which need not be set out here in detail, the premises and property have been sold and conveyed and are now in possession of the East Tennessee, Virginia and Georgia *Railway* Company, in whose behalf this argument is made.

By an amendment of the constitution of the State of Georgia, adopted at a popular election held December 5th, 1877, it was provided, Art. VII, Sec. 11, that,

"The General Assembly shall have no authority to appropriate money, either directly or indirectly, to pay the whole, or any part, of the principal or interest of the bonds, or other obligations which have been pronounced illegal, null and void, by the General Assembly and the Constitutional Amendments ratified by a vote of the people on the first day of May, 1877."

"The Constitutional Amendments ratified by the vote of the people on the first day of May, 1877," include the following, to be found at page 24 of the Session Acts of 1877.

"Neither the General Assembly nor any other authority or officer of this State shall ever have power to pay or recognize as legal, or in any sense valid or binding upon the State, any * * * endorsement of any railroad bonds * * * heretofore declared to be illegal, fraudulent or void by act or resolution of the Legislature of the State, or that may be declared illegal, fraudulent or void by act or resolution of the Legislature originating this amendment," etc.

The only other fact necessary to be here stated is, that, after the endorsement by the State of the first series, viz.: one million nine hundred and fifty thousand dollars of bonds, and before the indorsement of the second series or passage of the Act of October 27, 1870, purporting to authorize their issue, the Macon and Brunswick Railroad Company, in 1868, issued bonds to the amount of one million one hundred thousand dollars, and to secure the same, made and executed to Samuel A. Strang and James J. Goodwin, as trustees, a mortgage of all its road-bed and property, subject to the lien of the State bonds to the amount of one

million nine hundred and fifty thousand dollars (Record, 2, 59).

On the first day of November, 1870, Strang and Goodwin, claiming to act under written authority from the then holders of the bonds secured by the mortgage to them, in writing (Record, 14, 16),

"consented that the said additional three thousand dollars a mile of bonds, the endorsement of which, by the State of Georgia, has been authorized by said amendatory Act passed October 27th, 1870, be a prior lien upon the property embraced in the said mortgage in such manner and to such extent as is required under the Constitution of Georgia and the Act authorizing such endorsement,"

and subrogated and postponed the lien of the mortgage made to them as Trustees,

"dated the first day of September, one thousand eight hundred and sixty-eight, in such manner and to such extent that the endorsement of the State of Georgia upon the bonds of the said Macon and Brunswick Railroad Company to the extent of three thousand dollars a mile, being six hundred thousand dollars ($600,000) in all, authorized by the Act of the Legislature of the State of Georgia, passed the 27th day of October, 1870, * * * shall operate as a lien or mortgage on said property of said Macon and Brunswick Railroad Company prior to the lien of said mortgage executed and delivered to us, as Trustees, so as to comply with the terms of the Constitution of the State of Georgia and the law of such State authorizing such endorsement. But the said mortgage, so executed and delivered to us, shall continue to be held valid and in full force, according to the terms and tenor thereof, subject only to the lien of the endorsement of the State of Georgia of said bonds of said Macon and Brunswick Railroad Company for ten thousand dollars a mile and for three thousand dollars a mile in addition thereto."

The bonds, secured by the Strang and Goodwin mortgage, were negotiable, being payable to bearer. They have doubtless to some extent changed hands since the execution of this release by Strang & Goodwin, and these subseqnent purchasers would not seem to be bound by this release. *Carpenter* vs. *Longan*, 16 Wall. 271.

Even a *lis pendens* does not affect the negotiability of commercial paper.

Leitch vs. *Wells*, 48 N. Y. 585.
Secor vs. *Witter*, 39 Ohio St. 230.
Daniel on Negotiable Instruments, § 800a.

The contention of the complainant is that, by the terms of the Act of December 3, 1866, the holders of the bonds endorsed by the State took, by law or contract, such interest, as security for their bonds, in the railway property and franchises of the Macon and Brunswick Company, that the same could not be, and, in fact, were not, divested by the subsequent proceedings of the State and the purchase by the East Tennessee, Virginia and Georgia Company, and that the holders of the six hundred thousand dollars of bonds, issued by the State under the Act of October 27th, 1870, acquired thereby a like interest. To this we answer:

ARGUMENT.

I.

THE STATE OF GEORGIA IS AN INDISPENSABLE, BUT IMPOSSIBLE PARTY DEFENDANT TO THIS CASE. THEREFORE THE DECREE BELOW OUGHT TO BE AFFIRMED WITHOUT FURTHER EXAMINATION OF THE QUESTIONS INVOLVED.

This on three grounds. *First:* When this case was first before this Court it was held that the officers of the State could not be made parties, and the decree below, sustaining the demurrer, and dismissing the bill as to them, was affirmed. 109 U. S. 446.

The same principle was applied by this Court in *Christian* vs. *Atlanta & North Carolina R. R.* 133 U. S. 233.

The theory sought to be maintained, in 133 U. S. was that the complainant's bonds were a lien upon the stock owned by the State and upon any dividends thereon, and that, as the Court controlled the property, the State, which could not be made a party, was not necessary as a party, and so it had been held at the Circuit by Chief Justice WAITE in *Swasey* vs. *North Carolina R. R. Co.* 1 Hughes, 17.

To this the answer will be made that the State had no longer any interest in the property when the supplemental bill was filed, but this is to assume that the State's interest in the property was merely formal or technical.

On this theory, while the complainant could not

prosecute his suit during the ownership of the State, he had a right to hold his claim as a cloud upon the State's title and sue the moment the State parted with it. But this is to impair the title of the State, which I respectfully submit cannot be done. It is to do by indirection what is forbidden when attempted directly. If the control of the property by the Court cannot give jurisdiction to determine the rights of parties while the State is its owner, but the Court's power springs into life the moment the State parts with its ownership: then it is easy to see that the State cannot sell except at a price diminished by the risk assumed by the purchaser.

If I am wrong in this, it must be because the objection sustained by this Court at the former hearing of this case, and in 133 U. S. is matter of procedure merely, without relation to the substance of the proceeding. On the contrary, it seems to me that the State's title is necessarily incapable of attack in the hands of its grantee, as much as while held by itself. Otherwise there is little or no reason for the rule. One might as well be permitted to sue a sovereign State, as to lie in wait and sue its grantee on the theory that he has acquired no title, although his grantor was a State, which could do no wrong.

I do not maintain the broad principle that a party cannot sue merely because a State has made a conveyance in the chain of title. But where the attack is necessarily upon the title of the State, and the claim made is hostile to the State, and to the State's title, it does not seem to me to matter whether it is made

while the State is a party to the case, or after it has parted with its interest.

The objection is that it is essential to the maintenance of the complainants' claim that he should destroy or impair the State's title, and this seems to me impossible whether the State be or not a party to the case.

Secondly: The complainants are in this dilemma, viz.: either (*a*) the State has made a valid sale of the railroad, in which case they are remitted to their claim for a portion of the purchase money, which being in the State Treasury, cannot be reached in this or any other suit, or (*b*) the State has made an invalid sale, in which case the State still holds the title, and it being impossible to make the State a defendant the bill must be dismissed.

Thirdly: The complainants' claim is that they are *cestuis que trust* of the State. According to their theory, the act of October 27, 1870, under which their bonds were issued, was an amendment having the same effect as if it had been written into the act of December 3, 1866, under which the first series of bonds to the amount of $1,950,000 were issued.

Admitting this (for the sake of the argument), then the first section of the act of December 3, 1866, applies to the complainants' case. Indeed this is their claim. This provides that—

"Any endorsement of said bonds when thus made shall not only vest the title to all property of that kind which may be purchased of said bonds in the State until all the bonds so endorsed shall be paid, but the said endorsement shall be and is hereby understood to operate as a prior lien or

mortgage on all of the property of the company to be enforced as hereinafter provided for."

The second section provided that in case of default of payment of interest it should be the duty of the Governor to seize the railroad and apply its earnings to the extinguishment of the debt—

"and shall sell the said road and its equipment and other property belonging to said company, in such manner and at such time as, in his judgment, may best subserve the interest of all concerned."

The question at once presents itself whether complainants, even if they be *cestuis que trust* of the State, (which we deny), even though the State be seized of this property, not for its indemnity merely, but in trust also for the security of the bondholders, can put in motion the machinery, of which by the law the control is given to the State, for the purpose of securing payment of the bonds.

In other words, when one claims to be *cestui que trust* of an active trust of which a sovereign State is seized not only for his benefit, but for its own protection also, of which therefore the State is not a mere trustee without interest except in the performance of duty, but is a trustee of a trust coupled with an interest, can he proceed to subject the property to his claim without making the trustee a party, and the trustee being a sovereign State can he subject the property to his trust at all? Is not this the case of *Christian* vs. *Atlantic & North Carolina Railroad Company*, 133 U. S. 233, over again? We respectfully submit that as the State was interested in this property for the purpose of securing payment, in discharge of its obligation as endorser of

the bonds, the State had a right to control the execution of the trust for its own protection, and, being a sovereign State, cannot be forced to act, nor can the bondholder avail himself of the State's title or its right to act through the agencies of judicial tribunals.

II.

SECOND SERIES OF BONDS NOT SECURED, EXCEPT BY STATE'S ENDORSEMENT.

The Act of October 27th, 1870, does not purport to reserve any security whatever for the holders of the second series of bonds, except the faith and credit of the State. The act does not in terms purport to furnish them any other security, and if any be secured to them, it must be by a strained construction. The act is brief. It authorizes the Governor :

"To place the endorsement of the State, to the extent of [redacted] thousand (dollars) per mile, upon the bonds of said Macon and Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory."

The preamble recites, not the necessity of greater security than the faith and credit of the State of Georgia, (if any such could be), but, *first*, that the railroad has been completed at a greater cost than was anticipated, and *secondly*, that the State has endorsed bonds of other roads to the extent of fifteen thousand dollars per mile. Nowhere in the

act is there any allusion to any security to be reserved or taken for the State or bondholders. The argument will be that such security is imported by law into the act as a necessary implication from the fact that it is an amendment of the prior act, approved December 3, 1866, by which the State reserved security upon the property of the company.

But that act had been fully executed before the passage of the Act of October 27th, 1870. Such an amendment of a statute does not retroact, has no *nunc pro tunc* operation. It speaks from the date of its passage and not sooner.

If the Act of December 3, 1866, were a security of which the bondholders might avail themselves, their rights could not be affected by later legislation. Whatever rights and interests the bondholders had under the former act could not be diluted under the later.

The amendment of the Statute is not entitled to a larger meaning than the words import. To give it the meaning now sought to be attached requires an addition not therein to be found, viz., of the words:

"Upon the same security reserved to the State in the Act of December 3d, 1866,"

or,

"reserved to the State in the Act of which this is amendatory,"

or their equivalent.

A grant by the State cannot be created or enlarged by implication.

United States vs. *Arredondo*, 6 Peters, 691, 738.

Charles River Bridge vs. *Warren Bridge*, 11 Peters, 420, 546.
Fertilizing Co. vs. *Hyde Park*, 97 U. S. 659, 666.
Newton vs. *Commissioners*, 100 Do. 548, 561.
Railroad Co. vs. *Packet Co.* 125 Do. 260, 271.

The benefits to be derived from any enlargement of this amendment beyond its letter must, necessarily, by force of the rule established in the cases just cited, and those referred to in them, be limited to the State of Georgia.

Certainly a lien granted by the State in favor of bondholders cannot be created by implication. A lien in favor of the State might be. If, therefore, it prove that, upon the application of the authorities just cited, there be any room for implication at all, which we deny, it must be an implication which will not profit the plaintiff Cunningham, but only inure to the benefit of the State whose rights have passed by conveyance to the East Tennesse, Virginia and Georgia Railway Company.

The office and province of an amendment is fulfilled in this case, and the letter of the statute unchanged, by treating the bonds as being of two classes: *First*, one million nine hundred and fifty thousand dollars already issued under the Act of December 3d, 1866, for which the mortgage security was taken. At the time of the indorsement of these bonds by the State the road had not been completed. *Secondly*, after the completion of the road, the State made a further advance without re-

quiring (perhaps without supposing there was any necessity of) security.

The purchasers of the bonds are supposed to have read and been fully cognizant of the contents of the Statute, and to have been satisfied with the assurance this gave of security. It is not a strained construction to assume that, while, in 1866, before the completion of the railroad, security was required, the State, in 1870, and after cars were running from Macon to Brunswick, might have been willing to dispense with further security. Or if the security be treated, adopting the theory of our adversaries, as for the benefit of the bondholders as well as the State, it is not a strained construction to suppose that, although in 1866, just after the close of the Civil War, it was reasonably probable that purchasers might not easily be found for bonds without some other security than that of a State impoverished by war; in 1870 they would be willing to accept the reconstructed State as their endorser without the benefit of a collateral mortgage, especially as the one million nine hundred and fifty thousand dollars endorsed by the State had been secured by a first mortgage, and the holders had no practical claim upon the State Treasury for more than the deficiency in the value of the property to contribute that sum.

III.

THE GEORGIA CONSTITUTION OF 1868 FORBADE ENDORSEMENT OF STATE UPON SECOND SERIES OF BONDS.

The theory of the complainant is that under the Acts of 1866 and 1870 the bondholders are either beneficiaries of a trust of which the State was trustee, or are to be subrogated to the rights of the State, and are entitled thereby to a vested interest in mortgaged property, of which they could not be deprived by any legislation or executive action of the State of Georgia.

Accepting this theory as true for the sake of this part of the argument only, we respectfully submit that it proves too much, and cannot be adopted without defeating the complainants. The Constitution of Georgia in force at the time of the passage of the Act of 1870, provided that the credit of the State should not—

> "Be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State prior to any other debt or lien, except to laborers, nor any company in which there is not already an equal amount invested by private persons."

Assuming, for the sake of the argument (what is not shown), that there had been before the 27th day of October, 1870, amounts invested in the Macon and Brunswick Railroad Company by private stockholders equal to both series of the State endorsements, viz.: $2,550,000—assuming also that the release by Strang and Goodwin was authorized

by all the then holders of the negotiable Macon and Brunswick bonds, secured by the mortgage to Strang and Goodwin, and that it in law bound the future holders of such bonds, so that said mortgage did not constitute any objection, nevertheless, on the theory of the complainant, the property of the company was bound for the security of the bondholders to the amount of one million nine hundred and fifty thousand dollars, prior to the passage of the Act of October 27th, 1870, and the lien of the mortgage could not, without a violation both of the Constitution of the United States and the Constitution of the State of Georgia, be enlarged so as to admit the additional six hundred thousand dollars contemplated by that Act. It must not for a moment be forgotten that we are now treating this case upon the hypothesis of our adversaries, in which it will presently appear we have no confidence whatever, but our proposition is that on this theory the complainant and his learned counsel are "hoist by their own petard," as follows: On the theory that the first series of bondholders took a vested interest by law or contract prior to the Strang and Goodwin mortgage, and prior, of course, to bonds issued under the Act of October 27th, 1870, then, as against them, the mortgage could not, under the Constitution of the United States, be enlarged so as to admit six hundred thousand dollars more, without the consent of the holders of all the nineteen hundred and fifty bonds. Otherwise the validity of the contract would be impaired.

On the theory we are for the moment admitting, the holders of the nineteen hundred and fifty bonds

had, in equity at least, a first mortgage of limited amount. If it might be increased without their consent by the addition of six hundred thousand dollars, it might as easily be increased by the addition of six or sixty million dollars, and their security made to depend on the caprice of the State.

The complainant is in a dilemma. He is impaled on one or the other of its horns. Either the security was subject to be opened and diluted and washed into nothing by the action of the State, without consent of the bondholders, or it was fixed and limited in their favor, so that it could not be watered without their consent. To sustain the former of these theories the State's power must be plenary—quite broad enough to admit not only of what it is supposed to have done in creating the further issue of bonds, but in the sale of the property to the Macon and Brunswick Railroad Company, and by it to the East Tennessee, Virginia and Georgia Railway Company. On the other theory, the six hundred thousand dollars becomes a second mortgage, which is precisely what was forbidden by the Constitution of Georgia. The State was not allowed to take a second mortgage, but only a first mortgage. That is to say, in 1868, after the issue of the first series of bonds, the Constitution of Georgia, binding the State by restrictions not in force at the time of the first issue in 1866, provided prospectively that the credit of the State should not be granted or loaned to any company without a provision that the whole property of the company should be bound for the

security of the State, prior to any other debt or lien, except to laborers.

This was not at all complied with in the passage of the Act of 1870: *First*, there is no such provision in the Statute. The letter of the Constitution was ignored. *Secondly*, there was no such reservation in fact. What is meant is that the whole property of the company shall be bound to protect the credit of the State to the extent that it might be granted or loaned after the adoption of the Constitution in 1868. This was not in fact provided. The security reserved by the Act of 1870 could not exceed the property of the company, less nineteen hundred and fifty thousand dollars, to which extent, on the theory we are discussing, the bondholders of the State had a vested prior interest.

IV.

THE SECURITY PROVIDED BY THE ACT OF 1866 WAS FOR THE INDEMNITY OF THE STATE ONLY, AND NOT FOR THE PROTECTION OF THE BONDHOLDERS.

That the mortgage reserved by the Act of 1866 was not intended to create a trust or specific lien for the benefit of the bondholders, is established by the decision of Judge BRADLEY in the case of *Branch* vs. *Macon and Brunswick Railroad Company*, 2 Woods, 385. He there holds directly that the statutory mortgage established by the Act of

1866 was, "by way of indemnity," to the State. That this is the true construction of the mortgage, even a slight examination of its terms makes manifest, as follows: *First*, the Governor is to be satisfied that the road—

"is free from all liens or mortgages or other incumbrances which may in any manner *endanger the security of the State.*"

Then follows the further condition and express understanding:

"That any endorsement of said bonds when thus made shall not only *vest* the title to all property of every kind which may be purchased with said bonds *in the State* until all the bonds so endorsed shall be paid, but the said endorsement shall be and is hereby understood to operate as a prior lien or mortgage on all the property of the company, to be enforced as hereinafter provided for."

Secondly, there is not a word in the Act expressing that the object of the "lien or mortgage" was to secure the holders of the bonds. There is no condition of defeasance upon payment of the bonds. The object is, as expressed, "the security of the State." For this reason, it required the showing that the road is free from all prior liens which may in any manner endanger this security. For this reason, the title to the property purchased with the bonds is vested in the State, not upon condition of defeasance for the payment of the bonds, but upon a condition relating only to time of vesting, viz.:

"Until all the bonds so endorsed shall be paid."

And lastly, for this reason, the endorsement, which is to operate as a prior lien or mortgage, is to be enforced, not for the benefit of the bond-holder, but by sale of the road by the State,

"In such manner and at such time,"

As in the Governor's—

"Judgment may best subserve the interest of all concerned."

Moreover, during the possession of the road by the State, and after seizure by the Governor, as provided for in the *second* section, while the State is to—

"Apply the earnings of the said road to the extinguishment of said bonds or coupons,"

it is to do this by virtue of *its* possession and control of the road, and the moneys to be thus applied are those which come into its hands as the State's earnings. Besides this, it must not be forgotten that the endorser and mortgagee in this case was a sovereign State—the State of Georgia. Whether or not the State can do wrong, there is certainly no presumption that the State will do wrong, will fail to meet its obligations. The presumption is the other way, as Mr. Greenleaf successfully maintained in the Charles River Bridge case. In the absence of explicit language making the State a trustee for the benefit of its creditors, the natural presumption would seem to apply, viz.: that the fountain of all law and justice—the popular au-

thority, concrete in the State government of Georgia—cannot be supposed to have required security, except for its own protection, and will not be assumed to have bargained to constitute itself a trustee upon the hypothesis that it would or might fail to meet its own obligations.

The Constitution of 1868, under which complainant's bonds were issued, requires the whole property of the company to be

"bound *for the security of the State.*"

The State of Georgia endorsed these bonds. There is no presumption and was no provision whatever in the act indicating that the State expected to default upon its endorsement. It was supposed that the company might fail to protect the State, not that the State would fail to protect the bondholders. Therefore, irrespective of the explicit language of the Statute and the Constitution, the presumption in every case of doubt must be that the State, in reserving a security of this kind, was looking out for its own interest, and not dealing upon the theory that its endorsement would not be met.

In the cases in which the State has been held a trustee for bondholders, (*Hand* vs. *Savannah & Charleston R. R. Co.* 13 S. C. 467; *Forrest's Executors* vs. *Luddington*, 68 Ala. 1), the language of the statutes was explicit—that the States—South Carolina in the former case, Alabama in the latter:—

"upon the endorsing of said bonds and by virtue of the same shall be invested with the said lien or

mortgage without a deed from the company *for the payment by said company of said bonds with interest.*"

Upon these words the Supreme Court of South Carolina (and upon like language, the Supreme Court of Alabama) held that the promise of the company was not that the company should pay the bonds to the State, but to the holders of the bonds, and that the object of the lien was not to secure the State harmless from the consequences of non-payment by the company, but to insure to the holders of the bonds payment by the company, the State being a trustee of the security for their benefit.

In the *Tennessee Bond Cases*, (114 U. S. 663), like language was held to constitute a mortgage of indemnity only where a State had issued its own bonds, and a distinction was made by Chief Justice WAITE, (page 687), between the South Carolina case and the Tennessee case, upon the ground that, in the Tennessee case, the primary liability was that of the State, whereas in the South Carolina case it—

" rested on the company, and the State was bound only as surety."

And this, although in the Tennessee as in the South Carolina case, the bonds were "to constitute a lien."

But this result was because, as the Chief Justice shows, (p. 687):

"As the bond constitutes the lien, and the lien

is but an incident of the debt, the lien must continue and follow the bond in the hands of the holder thereof until it is finally paid and taken up by the company."

From which it was argued by counsel for the bondholders that the bondholder must be the beneficiary within the meaning of the Statute, and that payment would not discharge the company unless made to him.

But on page 688 the Chief Justice says:

"The loans were to be by the State to the companies, and the object was to secure the payment of the loans. It may well be that the same language when applied to one class of securities means one thing, and when applied to another class something else. The question now is, what does it mean in this case?"

The Chief Justice then goes on to show by a close examination of the language of the Tennessee Statute that, in the Tennessee case, although the bonds constituted the lien and the object of the lien was stated to be to insure payment of the bonds by the company, nevertheless the real object was indemnity to the State, viz., to insure the payment to the State of sums of money equal to the amounts the State might be called upon by its creditors to pay in discharge of its bonds.

The wide difference between the language of the Tennessee and South Carolina Statutes and that of the Georgia Act easily convinces the mind that the purpose of the latter was that of mere indemnity to the State. The words which in South Carolina were held to make the State a trustee and in Tennessee

not, are omitted in the Georgia Statute. There is no provision that the bonds shall "constitute a lien." There is no provision that the purposes of the lien shall be to insure "the payment of the bonds by the company." The endorsement in the case at bar is to vest title in the State not as a security, that the company shall pay the bonds, but—

"until all the bonds so endorsed shall be paid."

The endorsement is—

"to *operate* as a prior lien or mortgage on all the property of the company to be enforced as hereinafter provided for,"

that is, by sale made *by the State.* The endorsement is to "*operate*" as a lien, not as in Tennessee and South Carolina, to "constitute" or be the lien. The meaning of this is naturally and necessarily that the State shall be protected in its endorsement by the operation and effect of a statutory lien with a power of sale,—the bondholder being protected in his bond by the claim which he has upon the State evidenced by the Governor's endorsement.

That this is the true construction is still further manifest from an examination of the case of *Chamberlain* vs. *St. Paul & Sioux City R. R. Co.* 92 U. S. 299. In this case Chamberlain claimed, as the complainant claims here, that he was entitled to have the securities taken by the State applied to the payment of the bonds held by him. These securities are stated in the report of the case (p. 301) to have been the following:

"2d. The security to be taken for the payment of the interest on the bonds received by each company was to consist of an instrument pledging the net profits of its road; and the security against loss on the bonds was to consist of a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell, and a transfer to the treasurer of the State of an amount of first mortgage bonds on the roads, lands and franchises of the company, corresponding in amount to the State bonds issued to it. The delivery of the first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it by the Governor, no more State bonds were to be thereafter issued to that company; and the Governor was to proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or required a foreclosure of the mortgage executed by the company to secure its bonds."

Upon this state of facts, this Court, with a single dissenting opinion, held that the mortgage was given for the purpose of indemnifying the State only.

Further reference will be made to this case in later pages of this brief, but, for the present, all that is necessary to do is to call attention to the following: *first*, to the language of the earlier part of the *second* clause of the syllabus, to wit:

"Where land is conveyed to the State by a corporation as indemnity against losses on her bonds loaned to it."

secondly, to the unsuccessful argument of Messrs. Cole & Evarts for the appellant (p. 305):

"The position of the State in relation to the bonds is that of an accommodation maker of negotiable paper. She is simply a surety. The original Southern Minnesota Railroad Company, which endorsed the bonds, is the principal debtor. Hence, upon the doctrine of subrogation, the conveyance by that company of any property to the State, to indemnify her, creates a trust in favor of the holder of the bonds and appropriates the property so conveyed as a fund for the payment of them."

Thirdly. To the language of Mr. Justice FIELD, who, after stating the complainant's position, says (p. 306):

"The general doctrine, that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used, if neceesary, for the payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal."

In *Kelly* vs. *Truste s of Alabama and Cincinnati R. R. Co.*, 58 Alabama, 489, the statutory provision was also substantially, if not literally, the same as that under consideration by the Supreme Court of South Carolina in the case of *Hand* vs. *Charleston and Savannah R. R. Co.* It is to be found in the Internal Improvement Act of February 21, 1870, Alabama Session Laws of 1869 and 1870, beginning at page 149.

Section 3 (p. 151) contains the following provision:

"Said endorsement shall constitute a first lien

upon the section or sections of said road, * * * and the State of Alabama upon the endorsement of said bonds and by the virtue of the same shall be invested with said lien or mortgage without a deed from the company for the payment by said company of said bonds with the interest thereon, as the same becomes due; and when the whole of said road shall be completed the State of Alabama shall be invested with a first lien, without a deed from the company, upon the entire road within this State * * * for the payment of all of said bonds endorsed for the company, as provided in this act, and for the interest accruing on said bonds."

The *syllabus* of the case condenses the decision of the Court thus (italics ours):

"The internal improvement law, while providing that the State shall have a first and permanent lien for its protection, when it has endorsed bonds under that act, does not forbid the railroad corporations from creating other liens on the property subordinate to such lien of the State, especially a lien to secure the bonds endorsed, &c. * * * *The remedies afforded by the statute are given to and enforceable by the State alone.*"

On page 498 Chief Justice BRICKELL says that—

"The contract and liability of the State created by the endorsement is that of suretyship for the railroad company, indemnity and protection against the liability the statute intends to afford. This is its whole scope and operation. * * * It is not a lien or a security for the default of the State the deed of trust affords; but a lien or security for the default of the corporations, the principal debtor, which alone can involve the State in loss.

"The remedies the statute affords are intended for the protection of the State, * * * The remedies the statute affords are given to the State and the State alone can pursue them" (p. 499).

Forrest's Executors vs. *Luddington*, 68 Ala. 1, was decided by the Supreme Court of Alabama, in

1880, before the decision of this Court in the present case. The language of the statute was, in substance if not literally, identical with that of the South Carolina act. It may be found in the Session Acts of Alabama for 1867-8, at page 686, *et seq.*, in the Internal Improvement Act, approved February 19, 1867, which act was followed in the later act of February 21, 1870, already quoted. The *syllabus* thus states the proposition decided:

"The powers and summary remedies conferred on the State by the statute for the enforcement of this lien can only be exercised by the State, but the State having failed to exercise them and disclaimed its liability for the endorsed bonds, they afford no obstacle to a resort to a Court of equity by the holders of the bonds for the enforcement of the statutory lien for their benefit; and the fact that the State cannot be made a party to the suit, no relief being asked against it, does not affect the jurisdiction of the Court, or the equity of the bill."

The Court, however, pp. 13-14, admit that—

"There would be, perhaps, insurmountable difficulties in this cause, because of the absence of the State as a party, and the impossibility of making it a party defendant, if the rights conferred upon it by the statute had been exercised * * * But these rights the State has disclaimed, as it was in its volition to disclaim or to assert them. * * * While the State is by the statute made a beneficiary of the lien it creates, it stands also in the contemplation of a Court of equity in the relation of a trustee."

See also

Coll vs. *Barnes*, 64 Ala. 108.
Gilman vs. *N. O. & Selma R. R. Co.* 72 Ala. 566.
Morton vs. *N. O. & Selma R. R. Co.* 79 Ala. 590.

Had the Supreme Court of Alabama possessed the advantage of the knowledge of the opinion in the present case as reported in 109 U. S., a different conclusion might, perhaps, have been reached as to the possibility of pursuing the remedy, even in view of the repudiation of the bonds by the State.

This was the very proposition prensented to this Court by the demurrers to the present bill, and it was held impossible to proceed in the absence of the State But whether the Supreme Court of Alabama or this Court were right in this, need not be further considered in the discussion of the present case. Even the Alabama decision admits that if the State had exercised the rights conferred upon it, as was done in Georgia, there would have been "insurmountable difficulties" in the way of the bondholders.

A discriminating consideration of these cases points with absolute certainty, it seems to me, to the conclusion that the statutory mortgage reserved by the State of Georgia "operated" for the purpose of indemnity only, to protect the State against loss upon her endorsement,—the bondholder not being entitled as a beneficiary to any direct contractual or legal rights in the lien, but only to the equity of subrogation, to be enforced, if at all, by decree.

V.

THE BONDHOLDERS (SECOND SERIES) HELD NO SPECIFIC LIEN OR TITLE BY LAW OR CONTRACT. THEIR RIGHT, IF ANY, WAS BY WAY OF SUBROGATION, AND INCAPABLE OF ENFORCEMENT AGAINST A STATE OR ITS GRANTEE.

If I have succeeded in establishing that the mortgage in question was given for the indemnity of the State, then it follows from the case last cited, (*Chamberlain* vs. *St. Paul & Sioux City R.R. Co.*) that the position of the State as a sovereign not liable to suit deprived the bondholders of any equity which they could enforce against it, and the right of the bondholders, being by force of subrogation merely, and not a specific lien by law or contract, the sale by the State cut off all their interest in the property and remitted them to whatever claim they might have, to be presented to the Legislature of the State, and enforced by moral suasion only.

Mr. Justice FIELD, after deciding (p. 306) that, in the Minnesota case,

"it may be doubted whether the bondholders could call upon the company in any event,"

adds—

"Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any

lien which attached to and followed the property. It was a right to be enforced, if at all, only by a Court of Chancery against the surety. But, the State being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the State's grantees.

Where property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the Courts whenever the property comes under their jurisdiction and control. Thus, if property held by the Government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the Court to enforce the mortgage would attach, as it existed previous to the acquisition of the Government. (*The Siren*, 7 Wall. 158, 159.) But, where the property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unincumbered estate."

The application of this decision is enforced by the fact that, in the present case itself, it was held by this Court, while the State was in possession of the property, that the present complainant could not enforce any right whatever. The facts that the property was in Georgia, within the jurisdiction of the Court, and that the agents of the State in actual management of the property were made defendants, did not avail the complainant. The demurrers of the Governor, Treasurer and Directors were sustained, and this case waited upon the docket until the sale to the East Tennessee, Virginia and Georgia Railway Company made it possible to bring a defendant before the Court who was not a sovereign State or one of its agents. It is, therefore, established in this case that the plaintiff's right is an equity merely, nothing more. He has no specific lien or trust created

by law or contract. The property came under the jurisdiction and control of the Circuit Court, and, according to this Court, if the plaintiff held a contractual or legal lien or trust, the same might have been enforced, and it was the duty of all Courts to enforce it. But the Circuit Court refused to enforce it. This Court refused in the Chamberlain case, because one, whose right is an equity only against a surety, could not enforce the right against the State as such surety, and not being a specific, contractual or legal lien upon the property could not enforce it against the State's grantees. It was a lien upon the property in the Chamberlain case for the protection of the State, not a specific lien by law or contract for the benefit of the bondholders. This is what Mr. Justice FIELD means by the words,

"Not being a specific lien upon the property."

That the bondholder's right is an equity against the surety, to be enforced by decree, and not an interest in the nature of a specific lien, by law or contract, on the property, is also shown by the case of *Clews* vs. *First Mortgage Bondholders of the Brunswick and Albany R. R. Co.* 54 Georgia, 315.

The Brunswick & Albany Company had mortgaged its line of railroad to the State of Georgia to secure the State's endorsement upon its bonds. The State repudiated liability upon the endorsement. Thereupon a suit in equity was brought by the bondholders to subject the property to their claim.

Clews held two hundred bonds issued by the

Railroad Company, but not endorsed by the State, and claimed upon them that he was entitled to subrogation.

In denying this claim, Judge McKay stated, with great clearness and force, the equitable ground upon which the rights of the bondholders rest in such cases, thus:

"The whole equity of the bondholders to be subrogated to the security given by the road to the State as the endorser of the bonds depends upon the fact that they became the purchasers of the bonds upon the faith of the State's endorsement. We do not go into the question of the right even of *these* bondholders to be so subrogated; that has been decided by the Court below without appeal, and for the purposes of this case is admitted. We can only say that there seems to be equity in it. The bondholders may fairly be presumed to have looked behind the endorsement and to have advanced their money in view of the fact that the State, the apparent endorser, was secured by the mortgage. At any rate, that is the equity upon which the decree is based—the fact that the State seemed to be the endorser; that they advanced their money on the faith of the endorsement, secured as it was by the mortgage."

The idea that the right of the creditor to, subject to his own benefit the indemnity which was given to the surety, is any other than an equity to be enforced by decree,—that the surety is a trustee by law or specific contract, or to be charged with trust relations otherwise than by decree,—the idea that the creditor has any lien on or vested interest in the property, conveyed to the surety by way of indemnity, is novel. The right of the surety has been uniformly asserted by Chancellors as in the nature of an equity for subrogation. Mr. Pomeroy, in his

work on Equity Jurisprudence, Section 1419, under the title "Subrogation," after showing that the surety who has paid or discharged the debt is entitled to be substituted to and have the benefit of all securities placed in the creditor's hands by the principal debtor, adds:

"The doctrine and remedy of subrogation are extended also to the creditor who is subrogated to, and entitled to the benefits of all securities given to a surety for the purposes of *his* indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-sureties."

In a note to this passage, Mr. Pomeroy says:

"The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The grounds and reasons upon which it depends have already been explained. Being a doctrine of purely equitable origin and nature, its operations is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract."

From this it must follow that the purchase by the East Tennessee, Virginia and Georgia Railway Company from the State, whether with or without notice that the original statutory lien was given to the State by way of indemnity, involving, as it does, the grant of the legal title to the Railway Company, enables it to assert, by force of this fact alone, a claim superior to that of any equity of the bondholders.

1 Story's Eq. Jur. § 64*c*.

The distinction we are endeavoring to enforce was made by this Court in *Railroad Companies* vs. *Schutte*, 103 U. S. 118. On page 141, the Chief-Justice, reporting the opinion of the Court, without dissent, says:

"In our opinion there is no occasion for applying here the doctrines of subrogation, because, in unmistakable language, the statute has made the mortgage of the company security for the payment of the obligations of the State. This we understand to be in accordance with the opinion of the State Court, as expressed in the Holland and Florida Central cases, reported in the 15th and 16th of Florida Reports."

The necessarily different results of that case and this are made manifest by the difference between the language of the statute in that case and this.

In the Florida case the State issued to the Company its own coupon bonds, in exchange for which the Company delivered to the Governor,—

"Coupon bonds of the company, bearing a like rate of interest, payable to the State of Florida, and coupons payable to State of Florida."

The 11th section of the Florida Act, to be found on page 124 of 103 U. S. defines the effect and purpose of the statutory lien in the following words, (italics ours):

"Sect. 11. *To secure the principal and interest of the said company bonds, the State of Florida shall, by this act, have a statutory lien*, which shall be valid to all intents and purposes as a first mortgage duly registered on the part of the road for which the State bonds were delivered, and on all the property of the company, * * * *and in*

case of a failure of the company to pay either principal or interest of its bonds, * * * it shall be lawful for the governor to enter upon and take possession of said property and franchises, and sell the same at public auction * * * and all moneys arising from said sale and paid into the Treasury of this State, as heretofore prescribed, *shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State of Florida, under this act.*"

This was necessarily held to create a trust for the holders of the bonds;—such was the contract both in letter and in spirit. Had it been held, however, that the contract imported indemnity merely, then, as Chief-Justice WAITE says, there would have been—

"occasion for applying here the doctrines of subrogation,"

and the reason why those doctrines were not resorted to, to use his own language again, was,

"because in unmistakable language the statute has made the mortgage of the company security for the payment of the obligations of the State."

In *Murdock* vs. *Woodson*, 2 Dillon, 188, a statutory lien had been created by the State of Missouri, which, it was claimed, inured to the benefit of the holders of its bonds. Judge DILLON, after stating this claim, says, pp. 206-7:

"I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The State issued its bonds, and these were negotiated and taken upon the State's faith and credit, without any accompanying security. To indemnify itself, the State provided for and re-

ceived a mortgage upon the road of the company and a pledge of its net tolls and income. Then comes the further provision that the company shall punctually pay the interest and principal of the bonds; but if they fail to do so, the State may sell the road to others, or buy it in itself, to be thereafter disposed of as the Legislature may direct. It could not be maintained, we think, that if a sale were made by the State to a third person, he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the Act under which the aid was given and a lien reserved to the State, with the provisions of the fourth and fifth Sections of the Constitutional Ordinance, as expounded by the Supreme Judges (37 Mo. 129, 134), and with the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it. The Judges, in their answer to the Governor, distinctly say that, 'when the State becomes the purchaser of the railroad under the lien reserved, both the lien and the former company are extinguished. The State remains liable for her own bonds and owns the railroad, and the State may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money."

This decision was affirmed in *Woodson* vs. *Murdock*, 22 Wallace, 351, but without reference in the opinion to this question.

VI.

THE SALE BY THE STATE CUT OFF ALL RIGHTS OF BONDHOLDERS.

But there is another conclusive reason why the lien did not enure to the benefit of the bondhold-

ers, and why the East Tennessee, Virginia and Georgia Railway Company holds the property free from its incumbrance.

The Act of 1866, in so many words, provides that the Governor—

"shall sell the said road and its equipments, and other property belonging to said Company, in such manner and at such time as in his judgment may best subserve the interest of all concerned."

In June, 1875, he sold this property at public auction for one million dollars. This provision for sale was not for the mere purpose of transferring the equity of redemption, or, in other words, the property subject to the lien. It was to divest the lien and give a perfect title to the purchasers. The word "sale" imports this,—the object of the sale—"the interest of all concerned," imports this. This power of sale provided in the original act is an essential feature of the lien or mortgage itself. Without this, it is not to be presumed that the State would have endorsed the bonds. It is well settled in Georgia that the power to mortgage includes the power to authorize the mortgagee to sell in default of payment.

Robenson vs. *Vason*, 37 Ga. 66.

In *Brunswick and Albany R. R. Co.* vs. *Hughes*, 52 Ga. 557, it was held that,

"Where a railroad company, with authority to issue bonds which should be binding upon its property, issued the same, and, to secure them, executed a deed of trust to certain trustees, with authority to the trustees * * * to sell at public auction

* * * the trustees may, when the conditions are broken, * * * sell without foreclosure before the Courts, and if they proceed to sell by advertisement and sale, as is provided by law, in the case of mortgage executions, the sale will divest the title of the company."

In *Calloway* vs *People's Bank of Bellefontaine*, 54 Ga. 441, the Court (p. 449) repeated its decision,

"that a power of sale might be attached to a mortgage in this State, and we see no reason to reverse it. It is in accord with the rulings of the English Chancery Courts, where a mortgage is just what it is here; 2 Sugden on Vendors, 188; 2 Spence Eq. 634, etc. The idea is, we think, a fanciful one, that such a power is not coupled with an interest. The mortgage *has*, as we have seen, an interest, and an interest in the thing. It is pledged to him; he is a purchaser of that interest, and a Court of equity will protect him in it, and will protect it for him. We see nothing in this declaration of the Code, that a mortgage is only a security, that negatives the idea that a power to sell in a mortgage is coupled with an interest. The two ideas are just as consistent and harmonious as the idea of the English Chancery Court as to the nature of a mortgage was with a power of sale. Indeed, it is mainly in Chancery Courts, all of which treat a mortgage as only a security, and uniformly recognize the property to belong to the mortgagee, that the whole doctrine of powers to sell attached to a mortgage is expounded and announced. We are clear, therefore, that this is a good power of sale, and that it may be exercised according to its terms, fairly and honestly pursued."

In *Macon & Augusta R. R. Co.* vs. *Ga. R. R. Co.* 63 Ga. 103, it is held (see Section 4 of the *syllabus* and pages 120 and 121 of the opinion), that—

"A mortgage of a railroad to trustees for the objects above specified, which gives them the power

to take possession of the road and use it in certain contingencies, and at their discretion, on certain conditions, to sell it, contemplates that they may do the former only or both. The trustees need not confine themselves to either measure, but may first enter and then sell, using the road for the purposes of the trust until a sale is effected."

In *Willis* vs. *Jefferson*, 75 Ga. 743, Judge HALL says (p. 744):

"This mortgage contained a stipulation that if the mortgagor failed to pay promptly, the mortgagee might take possession of the property and sell it either at public or private sale. We do not understand that the mortgage could be enforced in no other manner than by the execution of this power, or that the plaintiff was thereby deprived of the remedy given by law to foreclose. The agreement gave him this power in addition to his legal remedies; it was merely cumulative, and did not impose upon him the necessity of making a demand for the property as a condition precedent to its foreclosure."

These authorities seem to leave no doubt whatever that the exercise of the power of sale reserved in the present case conveyed the property to the purchaser, freed from the "lien or mortgage."

That the power of sale was well exercised, see *Wood* vs. *Macon & Brunswick R. R. Co.* 68 Ga. 539, page 59 *post*.

VII.

THE STATE WAS NOT FORBIDDEN TO PURCHASE AT SALE MADE BY GOVERNOR.

It has been suggested that the State of Georgia could not purchase at the Governor's sale. Whether

this proposition is now to be pressed or not, I cannot now anticipate, but it seems to be wholly unfounded. In the *first* place, there is no authority whatever for the proposition that a surety cannot in good faith dispose of the securities he has taken for his own indemnity. If authorized by law or contract, he may bid on them and become the purchaser thereof. In some of the cases in which indemnifying mortgages have been made, to secure States loaning credit to railroad companies, provisions were inserted authorizing the State to bid at the sale. This was so in the Missouri case, *Murdock* vs. *Woodson*, already cited.

In the Minnesota case, (*Chamberlain* vs. *St. Paul and Sioux City Railroad Company*, *supra*), there was, as here, ample authority, in the original act, to sell, but none for the purchase by the State, and the case is, in this respect, precisely like this. It does not seem to have occurred either to the learned counsel, or to this Court, that the State of Minnesota remained subject to any trust for bondholders after her purchase of the lands, nor did it occur to the Supreme Court of Georgia, in the case of *Wood* vs. *Macon & Brunswick Railway Company*, (page 59 *post*,) that the railroad now in controversy was still subject to the claim of the bondholders after the purchase by the State.

But we are not left to depend upon the silence of these learned Courts. The General Assembly of Georgia, in the exercise of the plenary power committed to it by the Constitution of the State then in force, authorized the State to bid and buy at the sale. By so doing no damage was done to

any one; another bidder—a competing bidder—was added to the list of those who might wish to acquire the road. This could not be other than beneficial to all interested. The Constitution of Georgia of 1868, then in force, provided, (Art. 3, Sect. 1), that—

"the Legislative power shall be vested in a General Assembly."

This means the entire legislative power of the State, all that could be conferred—viz. the right to pass any law not prohibited by the Constitution of Georgia, or by the Constitution of the United State, or by the essential nature of things.

In the Credit Mobiler case, *United States* vs. *Union Pacific Railroad Company*, 98 U. S. 569, Mr. Justice MILLER, reporting the opinion of the majority of the Court, says (p. 613):

"The government sustains two distinct relations to the railroad company, and, in considering her rights under this statute, it is important to keep them separate. The company is organized under, and owes its corporate existence to, an Act of Congress. The Government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power."

In the *Sinking-Fund cases*, 99 U. S. 700, this Court (Chief Justice WAITE) at page 719, says:

"This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control, so far as its business affects the public interest. *Chicago, Burlington & Quincy Railroad Company* vs. *Iowa*, 94 U. S. 155;

and on page 724, in the same opinion, it is stated that—

"The United States occupy towards this corporation a two-fold relation—that of sovereign and that of creditor. *United States* vs. *Union Pacific Railroad Company*, 98 U. S. 569. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty."

In the former of these cases the Act of March 3, 1873 (17 Stat. at Large, 509), was upheld as a valid and constitutional exercise of legislative power. This was an act requiring the Attorney-General to bring a suit in equity in any Circuit Court against the Union Pacific Railroad Company, authorizing process to be served without the limits of the district where a suit might be brought, and parties and subjects of controversies to be united which in an ordinary Chancery suit would render a bill multifarious.

I quote the following from the syllabus:

"3. Statutes have been frequently passed directing suits for specific objects to be brought by an attorney-general, and regulating the proceedings in them, such as a *quo warranto* or a bill in equity against a corporation to test its right to the exercise of its franchises or to declare them forfeited, or, if insolvent, to wind up its business and distribute its assets; and the validity of such statutes has uniformly been recognized."

These decisions, although made in matters within the cognizance of the United States, are, *mutatis mutandis*, applicable to the legislative action of the State of Georgia.

If the principles enunciated in these cases be applicable to the United States, whose Congress has only the enumerated and the necessary incidental powers, then *a fortiori*, they will apply to sustain the legislation of the State of Georgia, the General Assembly of which has been invested not merely with granted powers but with all powers not denied.

Judge REDFIELD says (*Thorpe* vs. *Rutland & Burlington R. R. Co.* 27 Vt. 140-142):

"It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how upon principle it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general unlimited manner to the several State Legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question."

Chief-Justice DENIO, in *People* vs. *Draper*, 15 N. Y. 532, said (p. 543):

"The people in framing the Constitution committed to the Legislature the whole law-making power of the State which they did not expressly or impliedly withhold."

Authorities to this proposition might be multiplied indefinitely. Some of them, including those just referred to, are cited by Judge COOLEY at

pages 88 and 89 of his work on Constitutional Limitations.

To confer the power of purchase upon the State of Georgia in advance of the sale was the exercise of legislative, not executive or judicial, power. Chief-Justice MARSHALL said in *Wayman* vs. *Southard*, 10 Wheat. 1, at p. *46, that:

"The difference between the departments undoubtedly is, that the Legislature makes, the executive executes, and the judiciary construes, the law."

It was said in Vermont, (*Bates* vs. *Kimball*, 2 Chipman, 77), that that which distinguishes a judicial from a legislative act is that the former determines what the existing law is in relation to something already done, while the latter predetermines what the law shall be for the regulation of future cases falling under its provisions.

Judge COMSTOCK, in *Wynehamer* vs. *People*, 13 N. Y. 378, admitting that the Legislature cannot, aside from the special limitations of the Constitution, exercise powers which are in their nature essentially executive or judicial, says (p. 391):

"It is only the 'legislative power' which is vested in the Senate and Assembly. But where the Constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice MARSHALL said (*Fletcher* vs. *Peck*. 6 Cranch., 135): 'How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.'"

In *Merrill* vs. *Sherburne*, 1 N. H. 199, Judge WOODBURY states the difference between judicial and legislative power thus (p. 204):

"It is the province of Judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore—to compare the claims of parties with the laws of the land before established—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as a 'rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

Again, Mr. Justice SMITH THOMPSON, in *Dash* vs. *Van Kleeck*, 7 Johns. 477, said (p. 497):

"To declare what the law *is, or has been*, is a judicial power; to declare what the law *shall be* is legislative."

We submit that this case is within these or any other statements of the rule, which can be produced from any respectable authority in this country. It must follow that the authority given in advance by the law-making power of Georgia to the Executive Department of the State to purchase and sell this property for the protection of the State was a purely legislative act, within the power of the General Assembly, and, therefore, constitutional. It broke no contract, subverted no right; on the contrary, it was constructive, built up and and did not pull down;—added, did not withdraw bidding;—promoted, did not lessen competition.

VIII.

SECOND SERIES BONDHOLDERS CANNOT PROSECUTE SUIT WITHOUT OFFERING TO REDEEM.

It has been suggested that the holders of the second series of State bonds may derive benefit from some supposed disregard of law or duty by the State in making the sale. This subject has been fully considered by the Supreme Court of Georgia, and it is sufficient to refer to the opinion of that learned tribunal. But this class of objections has no force, when presented by a party who does not offer to "do equity," by refunding at least the purchase price paid by the State, with interest.

In *Wood vs. Macon and Brunswick R. R. Co.* 68 Ga. 539, the complainants were holders of burial lots in Rose Hill Cemetery, in the City of Macon. An ordinance had been passed by the City Council of Macon, authorizing the Macon and Brunswick Railroad Company, in extending its road from Macon to Georgia, to pass through the cemetery grounds. Thereupon a suit was brought in equity against the Macon and Brunswick Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and the Mayor and Council of the City of Macon, to enjoin the construction of the road through the cemetery. The injunction was denied by the Chancellor. Complainants appealed. Chief-Justice JACKSON says (p. 544):

"They, (the complainants), say that the present company have no title to the road because the Governor did not comply with the terms of sale prescribed by the General Assembly, and therefore

that the injunction should have been granted. Substantially, we think that the terms were complied with, and if they were not in mere particulars, not of vital consequence, that fact would not operate to render void the sale at the instance of private parties, especially so as to prohibit the company from going on with the road, the State not interposing at all, but having received part of the purchase money and being equitably bound to refund it before she herself could well set the sale aside; she has virtually acquiesced in it not only by the acts of the Governor but of subsequent legislatures."

Complainants do not offer to redeem. But their only remedy (if they have any), lies in redemption.

2 Jones on Mortgages, § 1631.

And in redeeming they must tender the whole amount of the bonds with interest even if the sale were void.

Brobst vs. *Brock*, 10 Wall. 519.
Collins vs. *Riggs*, 14 do. 491.
Davis vs. *Gaines*, 104 U. S. 386.

IX.

DEFENDANTS' TITLE PERFECT BY PRESCRIPTION.

On the first day of June, 1875, the State of Georgia became the purchaser of the Macon and Brunswick Railroad, and entered into possession thereof as owner. From that time until the present, possession has been held adversely to the claim of the complainant. The supplemental bill was filed December 30, 1886, so that more than eleven and one-half years elapsed from the time of the original sale to the commencement of the present litigation.

All the facts were necessarily public and notorious. The State had been long delinquent in the payment of coupons on the bonds issued under the Act of 1870, and the plaintiff must have had full notice of these transactions.

On the 13th of January, 1880, the railroad property was put up at auction to be leased under the Acts of September 3d, and October 14th, 1879. James M. Couper was the highest bidder, and upon an assignment of his bid to George H. Hazelhurst, A. J. Lane and William M. Johnston, they became the lessees, and were incorporated under the *Sixth* Section of the Act of September 3d, 1879, under the name of the Macon and Brunswick Railroad Company (Record, 74). Thereupon a lease was duly executed, dated February 28, 1880, to the said Railway Company, with privilege of purchase, as provided for in said acts. (Record, 73–76). On the same day the option was exercised, and the property was conveyed by the State to the Macon and Brunswick Railroad Company in fee simple. (Record, 77–80.) On the 14th day of June, 1881, the Macon and Brunswick Railroad Company sold and conveyed the same, with betterments and additions made by it, to the East Tennessee, Virginia and Georgia *Railroad* Company (Record, 81), which retained possession until September 30th, 1881, on which day it resold and reconveyed to the said Macon and Brunswick Railroad Company, (Record, 83), which took and held possession until November 4th, 1881, when it sold and conveyed to the Cincinnati and Georgia Railroad Company Record, 88). The last-named company thereupon

took and held possession until the 30th day of December, 1881, (Record, 83), when it sold and conveyed to the East Tennessee, Virginia and Georgia *Railroad* Company, and this company held possession until 1886, when the same was conveyed to the East Tennessee, Virginia and Georgia *Railway* Company, incorporated by a purchasing Committee who had acquired title at a sale in foreclosure under the authority of the Circuit Court of the United States in Tennessee (Record, 99–144).

These facts are believed to constitute a perfect title to the property, by prescription, under the Code of Georgia.

The sections of the Code which bear upon the subject are the following:

"*2678.* Title by prescription is the right which a possessor acquires to property by reason of the continuance of his possession for a period of time fixed by the laws.

2679. Possession to be the foundation of a prescription must be in the right of the possessor and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted and peaceable, and be accompanied by a claim of right. * * *

2683. Adverse possession of lands, under written evidence of title for seven years, shall give a like title by prescription. * * *

2685. Adverse possession of personal property within this State, for four years, shall give a like title by prescription. * * *

2686. No prescription works against the rights of a minor during infancy, of a married woman during coverture, of a person in prison, during his confinement, or of an insane person so long as the insanity continues. * * *

2687. A prescription commenced shall cease against persons under disability pending the disability; but on removal thereof the prior possession may be tacked or added to the subsequent possession to make out a prescription.

2688. A prescription does not run against an unrepresented estate until representation, provided the lapse does not exceed five years; nor against a joint title which cannot be severally enforced, and a portion of the owner's labor under either of the foregoing disabilities; nor in cases of fraud, debarring or deterring the other party from his action, until the fraud is discovered; nor against a party who commences his action in time, but is non-suited, or dismisses for one time, and recommences within six months.

2689. An inchoate prescriptive title may be transferred by a possessor to a successor, so that the successive possessions may be tacked to make out the prescription."

The foregoing sections contain the rules which the General Assembly of Georgia has seen fit, in its wisdom, to establish, to govern the cases of title acquired by prescription, including all the disabilities or excepted cases in which adverse possession does not have the effect of ripening into title by prescription. It will be observed that possession or control by the State is not among the exceptions.

We respectfully submit that it cannot be inserted by judicial construction. This is a case in which the language of the State is plain and express. The exceptions are enumerated and every enumeration excludes the possibility of any other or implied exception. *Expressum facit cessare tacitum.*

It cannot be argued upon these sections, as it might be upon the Statute of Limitations, that there can be no "right of *action*," within the meaning of the statute, where there is no power to sue, as during war, or against a State. The statutory rules of prescription are statutes of repose, founded on presumptions of title, and if the State of Georgia desired to make an exception to the ripening of adverse possession into prescriptive

title, it would have been easy to have done it in express terms.

Mr. Wood, in his work on Limitations of Actions, Section 6, page 9, says:

"The general rule is, that whatever the Courts may think the Legislature would have done if it had foreseen a certain contingency, nevertheless, a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein. In other words, the Legislature makes the law and the Courts apply it, and they cannot extend it to cases to which it does not apply, or except from its operation cases clearly coming within its provisions, and not excepted from its operation."

The Sam Slick, 2 Curtis, 480.

United States vs. *Maillard*, 4 Benedict, 459.

Semmes vs. *Hartford Ins Co.* 13 Wallace, 158.

It is quite true that it has been held that the Statute of Limitations did not run during the Civil War as to matters of controversy between citizens of the opposing belligerents.

Mr. Wood, stating this rule, and citing the cases which sustain it, adds the following criticism, in a note to the section already above referred to:

"This doctrine, so far as it has grown up under acts of the Legislatures in the States lately in rebellion suspending the statute during the civil conflict, is correct; but, independent of those acts or resolutions, there is no possible ground on which the doctrine could stand, except that the suspension is fairly implied from the emergency; and this latter position opens the door for a multi-

tude of exceptions, and would seem to border largely on the usurpation of legislative powers by the Courts, but with us, as will be seen from the cases cited, the doctrine is too well established to be disturbed."

This, however, as already suggested, applies to Statutes of Limitations affecting *actions* and rights of *action* only, and not to statutes providing for changes of title, or defining presumptions which shall establish titles by prescription.

In Georgia the suspension of the period of limitations during the war, and reconstruction periods, was by express statute, and not by judicial construction.

Chambliss vs. *Phelps*, 39 Ga. 386.
Bell vs. *Hanks*, 55 Ga. 274.

X.

COMPLAINANTS ARE BARRED BY LACHES AND ACQUIESCENCE.

Whether it appear that the East Tennessee, Virginia and Georgia Railway Company has acquired title by prescription, as claimed above, or not, at least it is believed that the complainants are barred from prosecuting this suit, by *laches* and acquiescence.

The time which elapsed after the State first conveyed to the Macon and Brunswick Railroad Company, by lease, with privilege of purchase,

and by deed, before the supplemental bill was filed, although less than seven years, (from Feb. 28, 1880, to Dec. 30, 1886, Rec. 73, 49,) is much more than required by any rule prevailing in equity relating to acquiescence and laches.

The equitable rule of acquiescence and laches is provided in terms by several sections of the Code of Georgia, as follows:

"*2924.* The limitations herein provided apply equally to Courts of law and equity; and in addition to the above Courts of equity may interpose an equitable bar in accordance with the established rules of such Courts, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights.

3094. Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right.

3196. Subsisting trusts, cognizable only in a Court of equity, are not within the ordinary Statutes of Limitation; but in all cases equity will consider the lapse of time in decreeing an account, and where, from it and other circumstances, it would be inequitable, any relief will be refused."

It is probable that there is no State in the Union in which the rule of laches is more stringently applied than in Georgia. Of this the case of *Wood vs. Macon and Brunswick Railroad Company*, 68 Ga. 539, already cited, is a signal instance. Rose Hill Cemetery belonged to the City of Macon, which had sold burial lots to the complainant Wood. After this, the city agreed with the Macon and Brunswick Railroad Company, that it might construct its line from Macon to Atlanta through the cemetery. The ordinance granting this title was passed on the

14th of August, 1881. The bill was filed on the 5th of October, 1881, and the argument presented to the Chancellor on the 10th of December, 1881. The actual execution of the contract between the City and the Railway Company was not until twenty-two days after the commencement of the suit, to wit: October 27th, 1881. Upon this state of facts the Court say, (Chief-Justice JACKSON pronouncing the opinion, p. 548):

"The contract between the city and company had been long made; the line towards the cemetery laid off; money expended thereon in rights of way and other purposes; the roadbed actually laid or graded on a portion of it before complaint was made. The principle that to the vigilant and not to the sleepy equity opens her portals is applicable here, applies with sufficient force always to close her doors when by reason of that sleep the adverse party has expended money and labor, thinking that nobody interested would oppose the right to complete what had been commenced in the confidence which non-action by everybody interested had engendered."

The complainant's claim here is (if any,) in the nature of an equity. In Section 816 of Pomeroy on Equity Jurisprudence, the learned author, speaking of acquiescence, says that,

"even when it does not work a true estoppel upon the rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi estoppel*—upon the rights of remedy."

And again, in Section 817, he says,

"this form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars

his right to equitable relief, and leaves him to his legal actions alone."

In *Smith* vs. *Clay*, as reported in note to 3 Brown's Chancery Cases, *639, Lord Chancellor CAMDEN says, at *640:

"A Court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time.

Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence; where these are wanting, the Court is passive, and does nothing.

Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court."

This principle has been repeatedly applied by this Court.

Badger vs. *Badger*, 2 Wall 87.

Sullivan vs. *Portland & Kennebec R. R. Co.* 94 U. S. 806, 811.

Brown vs. *County of Buena Vista*, 95 U. S. 157.

Godden vs. *Kimmel*, 99 U. S. 201.

Coddington vs. *Railroad Co.* 103 U. S. 409.

Speidel vs. *Henrici*, 120 U. S. 377.

Richards vs. *Mackall*, 124 U. S. 183.

Young vs. *Clarendon Township*, 132 U. S. 340.

Hanner vs. *Moulton*, 138 U. S. 486.

Cressy vs. *Meyer*, 138 U. S. 525.

Underwood vs. *Dugan*, 139 U. S. 380.

Hammond vs. *Hopkins*, 143 U. S. 224.
Galliher vs. *Cadwell*, 145 U. S. 368.
Ware vs. *Galveston City Co.* 146 U. S. 102.
Johnston vs. *Standard Mining Co.*, 148 U. S. 360.
Lane & Bodley Co. vs. *Locke*, 150 U. S. 193, 201.

It has also been held that the objection may be made by demurrer.

Wollensak vs. *Reiher*, 115 U. S. 96.
Graham vs. *Boston, Hartford & Erie R. R. Co.* 118 U. S. 161.

In *Sullivan* vs. *Portland & Kennebec R. R.* 94 U. S. (*supra*), it is held that Courts will apply this rule *sua sponte*.

Mr. Justice SWAYNE, speaking of the doctrine in question, says (p. 811) that so stringent is this rule that it—

"Is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the Court will, upon that ground, be passive and refuse relief."

It is, therefore, respectfully submitted that the decree of the Circuit Court should be affirmed.

New York, October 9, 1894.

GEO. HOADLY,
with ERWIN & DU BIGNON,
Of Counsel for Defendants.

NOV 30 1894
JAMES H. McKENNEY,
CLERK.

156-400

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 91.

CUNNINGHAM & BRANCH

vs.

MACON & BRUNSWICK R. R. CO.

Memorandum of Authorities cited by John Howard of Counsel for the Appellants, on the Oral Argument, and of the Points upon which they were Cited.

IN THE SUPREME COURT OF THE UNITED STATES.

CUNNINGHAM & BRANCH

vs.

MACON & BRUNSWICK R. R. CO. AND OTHERS.

Memorandum of Authorities Cited by John Howard of Counsel for the Appellants, on the Oral Argument, and of the Points upon which they were Cited.

I. In respect to the construction of the act of December 4th, 1866, there are two classes of cases to be considered:

(1) When the State assumes a liability for a corporation, and the corporation conveys its property in trust as an indemnity to the State against loss, and the bondholders of the corporation take nothing.—*e. g. Chamberlain* v. *St. Paul R. R.*, 92 U. S. 299.

(2) When the State assumes a liability for a corporation, and the corporation conveys its property in trust as an indemnity to the State, and *also* in trust to secure its bondholders as its principal debtors.—*e. g. Hand* v. *South Carolina R. R.*, 12 S. C. 314, cited and approved in Tennessee Bond Cases, 114 U. S. 688, and *e. g.*—also *Railroads* v. *Schutte*, 103 U. S. 119.

In this last case, it was held that the endorsement by the State of Florida of the bonds of the Railroad Company was void, because unconstitutional; but it was also held that such fact did not impair the validity of the statutory mortgage and trust in favor of the bondholders of the Company. And that case was cited and approved in *Supervisors* v. *Stanley*, 105 U. S. 312.

Should it be held that the endorsement by the State of Georgia of the bonds of the Macon and Brunswick Railroad Company was unconstitutional and void, *Railroad* v. *Schutte* would directly apply in favor of the express statutory trust for the bondholders of this Company, whose bonds were thus endorsed.

II. And now as to the legal effect and operation of the act of Georgia of October 27th, 1870, as an amendment to the original act of December 4th, 1866.

There appears to be nothing in the Constitution of Georgia regulating the manner in which amendments to previous acts shall be made, as is provided in many of the States, and therefore the legal effect of this amendment must be governed by the general law and the unlimited power of the Legislature of Georgia to amend its Acts of Assembly in any manner it may deem proper and efficient for the purpose. The act of 1866 had been in full operation, and its purpose, intendment and effect are presumed to have been fully understood as securing an indemnity to the State for its endorsement of the bonds of the Railroad Company, and as an express trust for the payment of those bonds, together with ample power and machinery provided for those purposes. In 1870, the construction of the whole road, from Macon to Brunswick, had been completed, but the road was a dead thing, unless it could be furnished with equipments for its operation. The amendatory act was passed to accomplish that object, as its title and its preamble show; and then the act proceeded to amend the original act by authorizing the issue of additional bonds, with the endorsement of the State thereon, and repealed all acts in conflict with that legislation. The two acts must be taken as one act, and as having all of the effect of the terms and provisions of the original act in respect to the protection of the State and the bondholders, as if they were literally incorporated in the amendatory act *in todidem verbis*. *Holbrook* v. *Nicoll*, 36 Ill. 167. And if the act were susceptible of two constructions, one of which would so emasculate it as to make it meaningless and useless, and the other would be reasonable, and would vitalize and give it full legal effect and operation, and especially if in harmony with, and in effectuation of, previous legislation and its object and policy, the last should be adopted. *Southerland on Statutory Construction*, see § 323.

The provision of the State Constitution *in re nata* was of course impressed upon the act, and the question then arises, Whose duty was it to see that there was a fulfillment of the constitutional requirements before the endorsement of the State could be validly made upon the new bonds to be issued? And here, again, there are two classes of cases:

(1) One requiring the purchaser to ascertain and determine for himself, from public records, to which he is referred, some extrinsic

fact or facts necessary to authorize the act to be done which is to create the liability.—*e. g. Sutliff* v. *Lake Commissioners*, 147 U. S. 237, in which the two classes of cases are collated and distinguished in the opinion of the Court delivered by Mr. Justice Gray.

(2) The other requires such facts to be ascertained and determined by some officer or officers whose certificate as to the fulfilment of the necessary requirements is in the nature of an adjudication, and is conclusive upon the subject—*e. g.*, *Chaffee* v. *Potter*, 142 U. S., 355. Of this class is this case.

(1) By the first section of the original act, the Governor of the State was constituted the tribunal that was to be "*satisfied*" that the precedent conditions as to the State's endorsement had been complied with and fulfilled, and his endorsement of the bonds was at once a decision upon the subject, and an assurance and announcement to the public of the fact of such compliance and fulfilment, and whether right or wrong was binding upon all parties. And hence the State of Georgia has never made any question as to the validity of the endorsement of those bonds, but on the contrary has ever recognized it.

The Governor was charged with the same duty and judicial function in respect to the bonds authorized to be issued and endorsed by the amendment of 1870, with the addition only of ascertaining and determining or being "satisfied" as to whether or not the constitutional requirements had been fulfilled and complied with, and his endorsement upon those bonds was equally an express decision, certificate and announcement to the public as to the fulfilment of those requirements, and was equally the *imprimatur* of the State to that effect.

(2.) But the Legislature subsequently undertook to establish a tribunal with ample powers in the nature of an appellate jurisdiction for the investigation and review of the action of the Governor in the premises, by providing for the constitution of a Commission composed of three persons, one to be selected by the President of the Senate, and the other two by the Speaker of the House of Representatives, clothed with full authority and power, and with the ample time of sixty days, to enquire into the whole matter, and for that purpose with "full power and authority to examine witnesses under oath, to send for persons, books and papers, and to exercise such other powers as might be necessary to carry into effect the provisions of the Act." That judicial commission performed its duty and reported in favor of the validity of the

action of the Governor, and the Legislature adopted that report, and by a joint resolution enacted "that the State's guarantee on the bonds of the Macon and Brunswick Railroad Company is binding on the State." Brief of Mr. West, pp.6–7.

III. *Contract and estoppel, and violation of contractual obligation.* It was under these circumstances that the appellants purchased the bonds now in suit, for valuable consideration, in open market, not only without any notice of invalidity as to the State's endorsement or touching the express trust of which the State was trustee for the payment of the bonds, but, on the contrary, with the above solemn certificates and assurances of the State as to the regularity and binding effect of the whole proceedings in the premises. Record, p. 3, and pp. 151–152. There was thus formed between the State and the Company on the one hand and the purchasers on the other, a valid contract, the obligation of which was inviolable by anything that either the State or the Company could do, and which the State was estopped from attempting to undo. It was a contract on the part of the State, not only that it would be bound by its endorsement of the bonds, but that it would faithfully execute the express trust it had assumed for the payment of the bonds, interest and principal. Its subsequent repudiation of its contract did not affect its validity and binding obligation any more than did its repudiation of its contract in *Fletcher* v. *Peck*, 6 Cranch, 187, which was the prototype of this case.

IV. *Sale of the trust property a fraudulent breach of trust upon its face, and full notice of the fact to the successive alienees.*—The sale of the trust property in disregard of the rights of these bondholders was a plain breach of trust, and its purchase by the State at its own sale as trustee was not only another plain breach of trust, but was fraudulent *per se*, and its conveyance to itself bore the fraud upon its face and that fraud followed the title wherever it went.

No proof of actual fraud need be adduced by the beneficiaries of the trust when following the trust property; for the purchase by the trustee was *inherently* a breach of trust, and the law conclusively presumes it to have been fraudulent, and if, in a court of equity, such a transaction can ever be permitted to stand, except with the consent of the beneficiaries of the trust, the burden of proof is upon the trustee and his alienees to show that the property sold for its fair value, and that *uberrima fides* was exercised in the sale, and to "vindicate the tranaction from all suspicion."—*1 Perry on Trusts*, §§ 197, 195, 277; *2 Perry on Trusts*,

§§ 602 *o*, 602 *p*, 602 *w*; *Wormley* v. *Wormley*, 8 Wheat, 503; *Michaud* v. *Girod* 4 How., 421.

In the absence of such affirmative proof, a fraudulent breach of trust is indelibly stamped upon the face of the transaction, and is notice to all the world tracing title through that transaction of its inherent vice, and of the unaffected rights of the beneficiaries in the property. For, though the purchase was thus a fraudulent breach of trust, *ex rei necessitate*, and apparent upon its face, the conveyance of the trustee passed the legal title, which, indeed, was absolute at law, but subject in equity to its original trust, and the holder is himself a trustee for the beneficiaries.—*1 Perry on Trusts*, §§ 274, 374, 355; *2 Perry*, § 602 *k*; *Taylor* v. *King*, 6 Munford, 366–7; *Pownal* v. *Taylor*, 10 Leigh, 183; *Underwood* v. *McVeigh*, 23 Grat., 427.

Such is the case here. The conveyance from the State of Georgia, the trustee, to itself of June 3, 1873, expressly recites the fraudulent breach of trust as the origin of its title. Record, pp. 24, 26. The conveyance of the 28th of February, 1880, from the State of Georgia to the Macon and Brunswick Railroad Company expressly recites the same thing, and reserves a lien on the property for the payment of the purchase-money. Record, pp. 77, 80.

The next conveyance refers to that lien, and hence to the conveyance in which it was reserved. Record, pp. 88–90. The next conveyance also refers to that lien and its reservation. Record, pp. 81, 82. So as to the next conveyance, pp. 83, 84, and so as to the next and *last* conveyance—that by which the legal title, clothed with its original trust, passed to the defendant, the East Tennessee, Virginia & Georgia Railroad Company, which consequently holds it as trustee for the beneficiaries of that trust, the appellants and their associates. Record, pp. 88–90.

It thus appears that, in addition to the notice given to the world by the officially published Acts of the Legislature and the proclamations and advertisements of the Governor of Georgia, touching the manner in which and the purpose for which the sale of this trust property was to be conducted in breach of trust, and in addition to the notice given by the *lis pendens*, here is, in the chain of title leading up to the fraudulent breach of trust by the trustee in itself purchasing the trust property, actual and positive notice to all intermediate holders, and to the present holder, of that fraudulent breach of trust, as the origin and source of the only title conveyed to and now held by the defen-